The Role of Prosecutorial Discretion in Immigration Law

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I. INTRODUCTION

The year was 2002. Joy sat motionless at the corner of my desk; a glass vase of flowers wrapped in thick plastic and tagged with a card from two brothers whose journey spanned from South Asia to the United States. Imprinted in the brothers' file was an impressive list of accolades that overshadowed a history of transgressions with a credit card. "My" two brothers were resilient and over many years built many things—a business, families, and friendships along the East coast. They won the praise of a local Congresswoman and made me smile often. Their case was not a "win" in the sense of gaining a formal immigration status like a green card or work visa. Instead, the case was a success because an immigration officer told them (and me) that limbo in the United States was preferable to deportation to a land where they would feel like strangers. The officer's decision to place their case on hold was a favorable exercise of prosecutorial discretion.

The concept of "prosecutorial discretion" appears in the immigration

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Electronic copy available at: http://ssrn.com/abstract=1476341

statute, agency memoranda, and court decisions about select immigration enforcement decisions. Prosecutorial discretion extends to decisions about which offenses or populations to target; whom to stop, interrogate, and arrest; whether to detain or to release a noncitizen; whether to initiate removal proceedings; whether to execute a removal order; and various other decisions. Similar to the criminal context, prosecutorial discretion in the immigration context is an important tool for achieving cost-effective law enforcement and relief for individuals who present desirable qualities or humanitarian circumstances. Unlike the criminal system, prosecutorial discretion in the immigration system is a civil matter, and it is exercised with minimal safeguards or incentives.

While many scholars have written articles about undocumented immigration, restrictions on immigration, and immigrants' rights, there is a dearth of literature on the role of prosecutorial discretion in immigration law. This article describes the theory, history, and current standard of prosecutorial discretion in immigration matters. This article argues that prosecutorial discretion is both a welcome and a necessary component of immigration law. Drawing important and relevant lessons from the criminal and administrative law, this article shows why the existing model of prosecutorial discretion in immigration affairs is inadequate and, in some instances, misguided. The damaging impact of arbitrary immigration enforcement actions on the daily lives of undocumented noncitizens and their families is striking.[1] This article advocates for a bolder standard on prosecutorial discretion and greater mechanisms for oversight and accountability when such standards are ignored. Moreover, this article recommends that DHS recognize select acts of prosecutorial discretion as a substantive rule, where the actions operate as a de facto benefit to individuals who satisfy an identifiable set of criteria and favorable equities. This article is divided into five sections: 1) Legal Background and History, 2) Lessons from Criminal Law, 3) Lessons from Administrative Law, 4) Limitations of Prosecutorial Discretion, and 5) Recommendations.

The theory behind prosecutorial discretion is seemingly simple and two-fold. The first theory is monetary. Because the government has limited resources to spend, permitting the agency and its officers to refrain from asserting the full scope of their enforcement authority against particular populations or individuals is cost saving and arguably allows the agency to focus their work on the "truly" hazardous.[2] The second theory is

[1] *See* Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: Epiphany through Dialectic*, 44 GEORGIA L. REV. 65 (2009).

[2] As described by the late Maurice Roberts more than thirty years ago: "In the fiscal year ending June 30, 1974, the Service apprehended a record 788,000 deportable aliens and it has estimated that the

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humanitarian. Some individuals who are in technical violation of the law may nonetheless have redeeming qualities such as a loving marriage, continued employment as an office manager, status as a mother of three, and faithfulness to prayer and the payment of taxes. Often, these humanitarian considerations are weighed against moral deservedness, namely the gravity of a person's immigration transgression. Allowing such persons to live free from apprehension, detention, or removal is in some ways a reward for their good deeds and in part a judgment by society that some people are morally desirable and more likely to succeed in the future.

This article is limited to an analysis of prosecutorial discretion by immigration personnel employed by DHS, including but not limited to officers, attorneys and supervisors. Beyond the scope of this article is a scrutiny of the discretion exercised by administrative judges under the Department of Justice's Executive Office of Immigration Review in the context of formal applications for relief from removal. Similarly, this article does not address the discretion exercised by immigration officers as part of the formal adjudicatory process. Furthermore, although I attempt to distill prosecutorial discretion in the criminal and administrative contexts, the analysis is by no means exhaustive. Finally, while the grant of "deferred action" status represents just one among many exercises of prosecutorial discretion by the immigration agency, the author devotes disproportionate detail to deferred action for two reasons. First, deferred action serves as a good model from which to discuss prosecutorial discretion and analyze with administrative and criminal law. Second, practically speaking, focusing on deferred action enables the author to describe the history and evolution of prosecutorial discretion in a more fluid and chronological manner.

As to the terminology, the terms "deferred action" and "nonpriority" statuses are used interchangeably throughout this article. Moreover, unless otherwise indicated the term "Department of Homeland Security" will be referred to by its full name or by the abbreviation "DHS." Also, the term "1996 immigration laws" will be used to refer to amendments made to the Immigration and Nationality Act in 1996, and specifically, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA).

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total number of illegal aliens 'is possibly as great as 10 or 12 million.' While the accuracy of these high estimates has been questioned, it is clear that the Service has identified many more aliens here unlawfully than it has proceeded against. In determining which illegal aliens should be singled out for the initiation of deportation proceedings and which should be permitted to remain unmolested, for how long they should be permitted to remain and under what conditions, the Service exercises what is tantamount to prosecutorial discretion." Maurice Roberts, *The Exercise of Administrative Discretion Under Immigration Laws*, 13 SAN DIEGO L. REV. 144, 146 (1975-76).

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II. LEGAL BACKGROUND AND HISTORY

Prosecutorial discretion is an awesome power that affects the fate of more noncitizens than any other government action. As defined by the the former Immigration and Naturalization Service (INS) in 2000, "[p]rosecutorial discretion is the authority that every law enforcement agency has to decide whether to exercise its enforcement powers against someone."[3] Prosecutorial discretion is applied at both a categorical and an individual level.[4] Beneficiaries of prosecutorial discretion avoid removal and in some cases are eligible to apply for work authorization. One of the most common forms of prosecutorial discretion is "deferred action" and is discussed in greater detail below. Neither the immigration statute nor the regulations contain eligibility criteria for seeking a favorable grant of prosecutorial discretion. Similarly, unlike most formal applications for discretionary forms of relief from removal, acts of prosecutorial discretion have no written application form. Prosecutorial discretion can be exercised in a wide array of situations.[5]

The use of prosecutorial discretion and the "nonpriority program" specifically was revealed by INS in 1975 as a consequence of a lawsuit involving John Lennon and Yoko Ono.[6] Before this time, the nonpriority program was a secret operation of the INS.[7] Leon Wildes represented the

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[3] U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE FACT SHEET ON PROSECUTORIAL DISCRETION GUIDELINES (2000). *See also* Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, on Exercising Prosecutorial Discretion (Nov. 17, 2000), *available at* http://drop.io/iceprosecutorialdiscretion.

[4] *See* T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 776 (6th ed. 2008) (describing that prosecutorial discretion occurs at both macro and micro levels, and greatly influences which noncitizens are likely to be removed).

[5] As summarized by the Government Accountability Office in 2007, "…ICE officers exercise discretion when they decide whom to stop, question, and arrest; how to initiate removal; whether to grant voluntary departure (whereby aliens agree to waive their rights to a hearing and are escorted out of the United States to their home countries by ICE officers); and whether to detain an alien in custody. …[O]nce an ICE officer has made a decision to pursue removal, ICE attorneys exercise discretion when they decide whether and how to settle or dismiss a removal proceeding or to appeal a decision rendered by an immigration judge." *See* U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE ALIEN REMOVAL DECISION MAKING 2-3 (2007), *available at* http://www.gao.gov/new.items/d0867.pdf.

[6] Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 101 (1979-80) [hereinafter Wildes, *Operations Instructions*]. *See also* Lennon v. Richardson, 378 F. Supp. 39 (S.D.N.Y. 1974); *See also* Leon Wildes, *The United States Immigration Service v. John Lennon: The Cultural Lag*, 40 BROOK. L. REV. 279 (1973-74) [hereinafter Wildes, *The Cultural Lag*].

[7] *See* Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 (1976-77) [hereinafter Wildes, *Nonpriority Goes Public*]. *See also* BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 226 (2004).

couple and has since written extensively about the nonpriority program.[8] As described by Wildes, John Lennon entered the United States in the summer of 1971 as a visitor and was thereafter placed in deportation proceedings for overstaying his visa. Lennon and his wife came to the United States in order to assume custody of Kyoko, Yoko Ono's daughter from a previous marriage.[9] While Lennon and Ono were awarded custody over Kyoko by the family court, their situation was complicated by the fact that the child's father had kidnapped Kyoko and could not be found.[10] Because he believed he was charged with deportation for political reasons, Lennon requested for nonpriority status, among other forms of relief.[11] Through his attorney, Lennon spent more than one year trying to gather information from INS about the nonpriority status program and related procedures.[12] At the time, INS contended that data on the nonpriority status program was "not compiled."[13] Even when Lennon motioned his immigration judge to depose a member of the Government who was informed about the nonpriority status program, the immigration judge denied his request.[14] Ultimately, Lennon was able to obtain information through a Freedom Of Information Act (FOIA) action.[15] Specifically, information about the nonpriority program was available under the INS's "Operations Instructions" which, until the Lennon lawsuit, remained

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[8] *See, e.g.,* Wildes, *Nonpriority Goes Public*, *supra* note 7; Wildes, *Operations Instructions*, *supra* note 6; Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819 (2004) [hereinafter Wildes, *Deferred Action*]; Wildes, *The Cultural Lag*, *supra* note 6; Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service - A Measure of the Attorney General's Concern for Aliens, Part I*, 53 INTERPRETER RELEASES 25 (January 26, 1976) [hereinafter Wildes, *Nonpriority Part I*]; Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service - A Measure of the Attorney General's Concern for Aliens, Part II*, 53 INTERPRETER RELEASES 33 (January 30, 1976) [hereinafter Wildes, *Nonpriority Part II*].

[9] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 44–45. *See also* Lennon v. INS, 527 F. 2d 187, 189 (2nd Cir 1975); Wildes, *The Cultural Lag*, *supra* note 6; Wildes, *Nonpriority Part I*, *supra* note 8; Wildes, *Nonpriority Part II*, *supra* note 8.

[10] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 45; Wildes, *The Cultural Lag*, *supra* note 6; Wildes, *Nonpriority Part I*, *supra* note 8; Wildes, *Nonpriority Part II*, *supra* note 8.

[11] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 45. *See also* Lennon v. INS, 527 F.2d 187, 191 (2d Cir. 1975); Wildes, *The Cultural Lag*, *supra* note 6; Wildes, *Nonpriority Part I*, *supra* note 8; Wildes, *Nonpriority Part II*, *supra* note 8.

[12] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 45. *See also* Wildes, *Nonpriority Part I*, *supra* note 8; Wildes, *Nonpriority Part II*, *supra* note 8.

[13] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 45. *See also* Wildes, *The Cultural Lag*, *supra* note 6; Wildes, *Nonpriority Part I*, *supra* note 8; Wildes, *Nonpriority Part II*, *supra* note 8.

[14] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 46.

[15] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 49 (The distinguishing feature of "private" information was the so-called "blue sheets" of the officer's manual used to identify the classified and internal policies of INS.). *See also* Lennon v. U.S., 378 F. Supp. at 42 n.11 (S.D.N.Y. 1974).

private information on the INS "Blue Sheets."[16] As a consequence of the FOIA Action, and despite the numerous statutory exceptions to the publication of information, INS migrated information about the nonpriority program from the INS "Blue Sheets" to the published "White Sheets," signifying the newly public nature and existence of the program.[17]

A. The Evolution of Deferred Action: 1975-1997

In 1975, following the Lennon case, the INS issued guidance on deferred action under its "Operations Instructions." The governing section stated: "(ii) Deferred action. In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category."[18] The Operations Instructions also listed factors that should be considered in determining whether a case should be designated for deferred action:

> When determining whether a case should be recommended for deferred action category, consideration should include the following: (1) advanced or tender age; (2) many years' presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States effect of expulsion; (5) criminal, immoral or subversive activities or affiliations recent conduct. If the district director's recommendation is approved by the regional commissioner the alien shall be notified that no action will be taken by the Service to disturb his immigration status, or that his departure from the United States has been deferred indefinitely, whichever is appropriate.[19]

While John Lennon ultimately achieved lawful permanent resident "green card" status, therefore mooting out the decision of whether or not to grant him nonpriority status, his related Second Circuit case was the first to discuss nonpriority status, articulating it as an "informal administrative stay of deportation."[20] One year after the Lennon decision, the Fifth

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[16] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 46–47.

[17] Wildes, *Nonpriority Goes Public*, supra note 7, at 47. *See also* Wildes, *Deferred Action*, *supra* note 8, at 820.

[18] (LEGACY) IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, O.I. § 103.1(a)(1)(ii) (1975).

[19] *Id.*

[20] Lennon v. INS, 527 F.2d 187, 191 n.7 (2d Cir. 1975); Of note, John Lennon was approved for

Circuit construed nonpriority status as a program of pure administrative convenience, concluding that INS has the authority to operate deferred action for its own convenience without having to formalize it into a body of law.[21] The Fifth Circuit's "convenience-only" definition of the nonpriority program ignored the overriding humanitarian grounds upon which many of the cases were ultimately granted.[22] In contrast to the Fifth Circuit, the Eighth Circuit stayed deportation in two cases in order to afford the petitioners the opportunity to apply for deferred action pursuant to the Operations Instructions.[23] Notably, the Eighth Circuit cited to humanitarian considerations as a foundation upon which INS could grant the petitioners deferred action status.[24] According to the Eighth Circuit in *David v. INS*, "[w]e think there is presented here a substantial basis upon which a district director could place petitioner in a "deferred action category" allowing him to remain in this country on humanitarian grounds."[25]

The Eighth Circuit's conclusion is significant to the extent that it contains an implication that applying for nonpriority or deferred action status is a "right."[26] Building upon the Eighth Circuit, the Ninth Circuit in *Nicholas v. INS* held that the Operations Instruction on deferred action operated like a substantive rule.[27] Turning to the language of the Operations Instruction, the court in *Nicholas* concluded:

> Three points become readily apparent upon examination: (1) The sole basis for granting relief is the presence of humanitarian factors; (2) The Instruction is directive in nature; and (3) The effect of such relief upon a deportation order is to defer it indefinitely.…It is obvious that this procedure exists out of consideration for the convenience of the petitioner, and not that of the INS. In this aspect, it far more closely resembles a substantive provision for

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nonpriority status one week before the circuit decision, on September 23, 1975. Wildes, *Operations Instructions*, *supra* note 6, at n.10. *See also* Wildes, *Deferred Action*, *supra* note 8, at 821 n.10.

[21] Soon Bok Yoon v. INS, 538 F.2d 1211, 1211 (5th Cir. 1976). *See also* Wildes, *Operations Instructions*, *supra* note 6, at 102.

[22] Wildes, *Operations Instructions*, *supra* note 6, at 102.

[23] *See* Vergel v. INS, 536 F.2d 755 (8th Cir. 1976); David v. INS, 548 F.2d 219 (8th Cir. 1977).

[24] *Vergel*, 536 F.2d 755; *David,* 548 F.2d 219.

[24] *Vergel*, 536 F.2d 755; *David,* 548 F.2d 219.

[25] *David*, 548 F.2d at 223.

[26] Wildes, *Operations Instructions*, *supra* note 6, at 103–04.

[27] *Id.* at 105 (citing Nicholas v. INS, 590 F.2d 802 (9th Cir. 1979)). *See also* Wildes, *Deferred Action*, *supra* note 8, at 821.

relief than an internal procedural guideline.[28]

The implications of treating deferred action as a substantive rule are significant and analyzed in greater detail later in the article.

Leon Wildes examined 1,843 nonpriority cases approved by the Immigration and Naturalization Service (INS) through December 31, 1974.[29] Wildes found that humanitarian considerations (as opposed to the nature of the individual's deportation ground or activity which gave rise to such a ground) played an overriding role in an immigration officer's decision to grant or deny nonpriority status.[30] Wildes found that noncitizens who risked being separated from family, were elderly, young, mentally disabled or incompetent were granted nonpriority status in high numbers.[31] In profiling a handful of the more than 1,800 cases, Wildes made the somewhat ironic point that many of the noncitizens were granted nonpriority status on the very same ground for which they were deportable.[32] This was especially true of those deemed mentally incompetent or infirm.[33] Within these 1,843 cases, Wildes found that more than 100 cases involved noncitizens with previous drug convictions ranging from misdemeanor offenses to more serious ones such as the trafficking of cocaine and heroin.[34] Notably, Wildes found that the humanitarian factors utilized in the so-called "drug cases" were largely similar to the consideration applied to the remaining case types.[35]

The Operations Instruction on deferred action has been amended over the years. Importantly, following the *Nicholas* decision, INS amended the Operations Instruction to affirmatively state that grants of deferred action status were an administrative choice by the agency and in no way an "entitlement" to the noncitizen.[36] The INS's decision to amend the

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[28] *Nicholas v. INS*, 590 F.2d at 806–07.

[29] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 51. *See also* Wildes, *Nonpriority Part I*, *supra* note 8, at 29.

[30] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 52. *See also* Wildes, *Nonpriority Part I*, *supra* note 8, at 31; *see generally* Wildes, *Nonpriority Part II*, *supra* note 8.

[31] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 53. *See also* Wildes, *Nonpriority Part II*, *supra* note 8.

[32] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 57; *See also* Wildes, *Nonpriority Part II*, *supra* note 8, at 37.

[33] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 57. *See also* Wildes, *Nonpriority Part II*, *supra* note 8, at 36–37.

[34] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 61. *See also* Wildes, *Nonpriority Part II*, *supra* note 8, at 40.

[35] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 62. *See also* Wildes, *Nonpriority Part II*, *supra* note 8, at 40.

[36] Wildes, *Deferred Action*, *supra* note 8, at 822 (citing to ALEINIKOFF, *supra* note 4, at 769). Notably, many courts have concluded that the Operations Instruction is an intra-agency guideline that

Operations Instruction after *Nicholas* was most likely connected to the *Nicholas* court's compassion-based theory for upholding judicial review. By recasting the Operations Instruction as a measure of pure administrative convenience, the agency was able to avoid future judicial review.[37] In 1996, the Operations Instruction was moved into a new publication titled "Standard Operating Procedures."[38] The Operations Instruction was eventually rescinded in 1997 through a memorandum issued by former INS Acting Executive Associate Commissioner Paul Virtue.[39] Titled "Cancellation of Operations Instructions," the memo identified a series of Operations Instructions that were rescinded as a consequence of the 1996 immigration laws.[40] Virtue recalls that in cancelling the Operations Instructions, there was no intention by the agency to eliminate deferred action relief.[41] Rather, the purpose of cancelling the rule was "housekeeping" related-- there was an internal effort to take the Operations Instructions and place them into policy manuals like the Standard Operating Procedures manual.[42]

Consistent with the INS's intent, even after the Operations Instruction on deferred action was removed, the factors outlined in the Instruction for "deferred action" continued to be utilized. As described in a leading treatise on immigration law and procedure, "[w]hile the deferred action program is still an internal administrative arrangement, with no provision for an application or participation by the alien, it is appropriate for the alien or the alien's counsel to call to the attention of the district director the circumstances of a particular case, with appropriate documentation, and to

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confers no substantive benefit on aliens seeking inclusion in the deferred action category. *See* De Romiero v. Smith, 773 F.2d 1021 (9th Cir. 1985); Pasquini v. Morris, 700 F.2d 658, 661 (11th Cir.1983); Soon Bok Yoon v. INS, 538 F.2d 1211, 1213 (5th Cir. 1976); Lennon v. INS, 527 F.2d 187 (2d. Cir. 1975); Wan Chung Wen v. Ferro, 543 F. Supp. 1016, 1017–18 (D.N.Y. 1982); Zacharakis v. Howerton, 517 F. Supp. 1026, 1027–28 (D.Fla. 1981). *See* Velasco-Gutierrez v. Crossland, 732 F.2d 792, 798 (10th Cir. 1984). *See also* Siverts v. Craig, 602 F. Supp. 50, 53 (D.Haw. 1985) (construing 1981 instruction).

[37] Email from Stephen Legomsky, John S. Lehmann University Professor, Washington University School of Law in St. Louis, to Shoba Sivaprasad Wadhia (August 1, 2009) (on file with author).

[38] ALEINIKOFF, *supra* note 4, at 780. *See also* Memorandum from Doris Meissner, *supra* note 3, at 1 n.1 (referencing the Standard Operating Procedures that pertain to deferred action cases).

[39] Memorandum from Paul W. Virtue, Acting Executive Associate Commissioner, Immigration and Naturalization Service, on INS Cancellation of Operations Instructions (June 27, 1997) (available at 2 Bender's Immigr. Bull. 867).

[40] *Id.*

[41] Interview with Paul Virtue, former Executive Associate Commissioner, Immigration and Naturalization Service, in Washington, D.C. (July 23, 2009).

[42] *Id*. It was Virtue's vision that the Standard Operating Procedures manual would be made publicly available and operate with subregulatory authority like the Department of State's Foreign Affairs Manual.

request that consideration be given to placing it in deferred action status."[43] The treatise's inclusion of the description and process for applying deferred action underscores the agency's recognition of deferred action even after the O.I. was formally rescinded.

B. The 1996 Immigration Laws and Prosecutorial Discretion

Legislative amendments to the Immigration and Nationality Act in 1996 heightened the need for renewed guidance on prosecutorial discretion.[44] For example, the 1996 immigration laws eliminated opportunities for certain individuals deemed "arriving" or those subject to removal based on certain activities classified as criminal or terrorist-related to apply for removal relief, or if held in custody by immigration, to submit a request to an immigration judge for release on their own or on a bond.[45] Individuals classified into these special categories are incarcerated mandatorily without a bond hearing.[46] The 1996 laws also expanded the list of activities that could be classified as an "aggravated felony" and applied this new definition retroactively.[47] Additionally, the 1996 immigration laws meaningfully limited individual review in a federal court by placing statutory bars to review on certain noncitizens with criminal histories or with denials from the lower court that were related to the statutory bars on asylum and discretion, among others.[48] In a letter by then Assistant Attorney General Robert Raben to Massachusetts Congressman Barney Frank date January 19, 2000, Raben admitted:

> The IIRAIRA eliminated both the possibility of relief from deportation and the possibility of bond for many criminal and other aliens placed in deportation and/or removal proceedings who previously would have been eligible for relief. Consequently, the IIRAIRA rendered the exercise of prosecutorial discretion by the INS the only means for averting the extreme hardship associated with certain

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[43] CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 72.03(2)(h) (2009).

[44] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), 8 U.S.C.S. § 1103 (2008); Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 8 U.S.C.C. § 1105 (2006).

[45] *See* IIRAIRA, 8 U.S.C.S. § 1103 (2008); Immigration and Nationality Act (INA) §§ 235(b), 236(c), 8 U.S.C. §§ 1324(a), 1185 (2006).

[46] *See* IIRAIRA, 8 U.S.C.S. § 1103 (2008); INA §§ 235(b), 236(c), 8 U.S.C. §§ 1324(a), 1185 (2006).

[47] *See* IIRAIRA, 8 U.S.C.S. § 1103 (2008); AEDPA, 8 U.S.C.C. § 1105 (2006).

[48] Letter from Robert Raben, Assistant Attorney General, to Rep. Barney Frank, U.S. H.R., on Use of Prosecutorial Discretion to Avoid Harsh Consequences of IIRAIRA (Jan. 19, 2000).

deportation and/or removal cases.[49]

Recognizing the limits of his own agency's discretion Raben stated, "Unfortunately, prosecutorial discretion guidelines—without carefully drafted substantive amendments to the INA remain an inadequate tool to alleviate the excessively harsh consequences of the 1996 amendments in truly exceptional cases."[50]

The literature criticizing the 1996 immigration laws, and its consequences, is plentiful.[51] This article does not seek to rehash this critique here but instead highlights some of the provisions for purposes of analyzing it against the principle of prosecutorial discretion. A modified transcript from a 2001 symposium on immigration and criminal law hosted by the Association of the Bar of the City of New York, reveals the complexity and controversy of the 1996 IIRAIRA provisions and its relationship with prosecutorial discretion.[52] Former INS General Counsel Owen ("Bo") Cooper highlighted the fine line between the limits of prosecutorial discretion, as well as the politics of select Members of Congress who both created stern restrictions to the immigration statute, and then held INS accountable for failing to refrain from enforcing them against individuals who presented compelling equities.[53]

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[49] *Id*.

[50] *Id.* Arguably, one provision created by IIRAIRA that was partially improved by Congress years later with the passage of the REAL ID Act of 2005, 8 U.S.C.S § 1101 (2008), corresponds to judicial review. Congress created a subsection 242(a)(2)(D) titled "Judicial Review of Certain Legal Claims" which now reads: "Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." *See* INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D)(2006). While this change opened the door for certain decisions previously barred under IIRIRA to be reviewed in federal court if the decision raised a legal question, the majority of restrictions created by IIRAIRA remains.

[51] *See, e.g.*, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights,* 16 TEMP. POL. & CIV. RTS. L. REV. 387 (2007).

[52] Symposium*, Immigration and Criminal Law*, 4 N.Y. CITY L. REV. 9 (2001).

[53] *Id.* at 31. Meanwhile, Massachusetts Congressman Barney Frank shared his perspective on the politics of IIRAIRA and its relationship to INS's prosecutorial power: "What Congress said was 'We are going to take away all of your discretion.' The bill that passed purported to take away prosecutorial discretion. The purpose of the bill was to say to INS 'Deport them all.' It is none of your business to say, 'Stay here, or not to stay here. Get rid of all of them.' The INS should have said 'You can't make us do that.' The INS should have said 'We always have prosecutorial discretion.' No law enforcement body in the history of the world has ever enforced every law against everybody. But in the early stages the INS was terrified and they did go and scoop up some people whom no national person would have scooped up because they were afraid of Congress yelling at them. Next, the horror stories came out. The first reaction, as Mr. Cooper said, was that some of the members of Congress who supported a bill which had the very purpose of telling the INS not to use it discretion, then criticized the INS for not

In a written response to statutory changes made to the Immigration and Nationality Act by Congress in 1996, Bo Cooper issued a memorandum to former INS Commissioner Doris Meissner.[54] The purpose of the Cooper memo was to enable INS to study the use of prosecutorial discretion and provide a legal foundation for any guidance produced by INS in the future.[55] The memo itself reads like a short lesson plan, describing the principle, purpose, and limitations of prosecutorial discretion, and also identifying criminal law jurisprudence as a leading source.[56] The Cooper memo explains that, while immigration officers are not "prosecutors" in the literal sense, they nevertheless enjoy broad prosecutorial authority over enforcement decisions.[57]

On her last day as INS Commissioner, Doris Meissner issued a memorandum to all personnel regarding the use of prosecutorial discretion.[58] In many ways, the Meissner memo became the modern day "Operations Instruction" for practitioners to utilize in compelling cases. The Meissner memo is more expansive than the Operations Instruction to the extent that it identifies a range of possible actions (one of which is deferred action) to which prosecutorial discretion may apply.[59] Similarly, the Meissner memo reveals the government's theory for why prosecutorial discretion is necessary. Titled "Exercising Prosecutorial Discretion," the Meissner memo describes various acts that might fall under prosecutorial discretion:

> [Prosecutorial discretion] applies not only to the decision to issue, serve, or file a Notice to Appear (NTA),[60] but also to a broad range of other discretionary enforcement decisions, including among others: Focusing investigative resources on particular offenses or conduct; deciding

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using the discretion which they had taken away." *Id.* at 32–33.

[54] Memorandum from Bo Cooper, General Counsel, U.S. Immigration and Naturalization Service, on INS Exercise of Prosecutorial Discretion, (available at INS and DOJ Legal Opinions §99–5 MB 2006).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] Memorandum from Doris Meissner, *supra* note 3.

[59] *Id*. at 7–8.

[60] The Notice to Appear or NTA acts like a "charging" document. Procedurally, the NTA is served on the noncitizen and filed with the Immigration Court. Removal proceedings against a noncitizen commence once the NTA has been filed with the Immigration Court. The NTA itself contains important information about the government's alleged charges against the noncitizen, the latter's right to secure counsel at no expense to the government, and other important matters. The statutory section governing NTAs is INA § 239, 8 U.S.C. 1229 (2006). For a broader discussion about NTAs and related issues, *see* Wadhia, *supra* note 51.

> whom to stop, question, and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order.[61]

The Meissner memo details the cost-related arguments behind prosecutorial discretion. "Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations.…the Service must make decisions about how best to expend its resources. Managers should plan and design operations to maximize the likelihood that serious offenders will be identified."[62] The Meissner memo also puts the humanitarian theory behind prosecutorial discretion to paper by listing a number of largely compassionate factors that may be considered by an immigration officer in deciding whether to exercise prosecutorial discretion.[63] While the list at first appears long and unachievable the Meissner memo suggests that an individual need not show every factor to qualify and clarifies that an officer's decision must be based on a "totality of the circumstances, not on any one factor considered in isolation."[64] The non-exhaustive list of factors identified by Meissner includes: 1) immigration status, 2) length of residence in the United States, 3) criminal history, 4) humanitarian concerns, 5) immigration history, 6) likelihood of ultimately removing the alien, 7) likelihood of achieving enforcement goal by other means, 8) whether the alien is eligible or is likely to become eligible for other relief, 9) effect of action on future admissibility, 10) current or past cooperation with law enforcement authorities, 11) honorable U.S. military service, 12) community attention, and 13) resources available to the INS.[65] Notably, the Meissner memo instructs that discretionary judgments *must* be made astutely and consistently. Specifically, Meissner notes, "[s]ervice officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process–from planning investigations to enforcing final orders–subject to their chains of command and to the particular responsibilities and authority applicable to their specific

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[61] Memorandum from Doris, *supra* note 3, at 2.

[62] *Id*. at 4–5.

[63] *Id*. at 7–8.

[64] *Id.* at 8.

[65] *Id*. at 7–8.

position."[66] This language suggests that while the act of discretion is an option, exercising such discretion in a fair and evenhanded manner is an obligation. This is similar to the obligatory language of the former Operations Instruction on deferred action.[67]

According to some scholars, the statutory reduction or near-elimination of judicial and agency discretion as a consequence of the 1996 laws was not necessarily eliminated. Instead, the government's ability to grant a reprieve to desirable individuals and groups have been transferred to the Executive branch in the form of prosecutorial discretion.[68] As noted by immigration scholars Adam B. Cox and Christina Rodriguez:

> …[I]t is important to see that the Executive still has de facto delegated authority to grant relief from removal on a case-by-case basis. The Executive simply exercises this authority through its prosecutorial discretion, rather than by evaluating eligibility pursuant to a statutory framework at the end of removal proceedings. In fact, because these decisions are no longer guided by the INA's statutory framework for discretionary relief, the changes may actually have increased the Executive's authority.[69]

Cox and Rodriguez conclude that the scope of DHS's prosecutorial discretion may have actually expanded as a consequence of the 1996 immigration laws. If their conclusion is accurate, then the importance of having an agency that exercises prosecutorial discretion in manner that incorporates the various humanitarian-related factors once utilized in the formal adjudicatory context cannot be overstated.

C. Agency Reorganization and Reaffirmation of Prosecutorial Discretion

The September 11, 2001 attacks launched a national discussion on border security and immigration law. A wide variety of stakeholders, among them congressional members, leaders in the White House and Executive Branch, individuals who favor restrictions to immigration, and public policy think tanks linked the September 11, 2001 attacks to failures

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[66] Memorandum from Doris Meissner, *supra* note 3, at 1.

[67] O.I., *supra* note 18.. "In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he *shall recommend* consideration for deferred action category…." (emphasis added). *See also Deferred Action*, *supra* note 9, at 821.

[68] *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law* (U. Chi. Law Sch. Pub. Law & Legal Theory Working Paper No. 262, 2009), *available at* http://ssrn.com/abstract=1356963.

[69] *Id*. at 49.

in the United States immigration system, pointing to border vulnerabilities and deficiencies at the Department of State and Immigration and Naturalization Service. What followed was a quick but passionate debate in Congress about overhauling the Immigration and Naturalization Service, then a component of the Department of Justice, and moving many of its units into a new cabinet-level agency.[70]

With the passage of the Homeland Security Act of 2002, the INS was abolished by statute and immigration services, enforcement, and related policymaking (including visa policies) were transferred to a new "Department of Homeland Security."[71] The "services" unit known as the United States Citizenship and Immigration Services (USCIS) is responsible for processing affirmative applications and petitions such as lawful permanent resident ("green card"), asylum, and citizenship applications.[72] Similarly, the USCIS includes a citizenship office, congressional relations office, chief counsel's office and asylum and refugee affairs office.[73] As a consequence of meaningful tweaking by the former George W. Bush Administration, the immigration "enforcement" unit is comprised of two divisions: Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE).[74] As the name suggests, CBP reflects a merger of the U.S. Border Patrol, U.S. Customs, and other agencies.[75] The immigration-related functions managed by CBP include inspections at ports of entry, and arrests and seizures of people and things at and between ports of entry, among other functions.[76] Like USCIS, CBP houses a congressional relations office and chief counsel's office, as well as multiple offices focused on trade, border patrol, and international affairs, among others.[77] The second enforcement unit, ICE, is charged with a range of activities on the interior of the United States including investigating, arresting, detaining and charging noncitizens who are in violation of the immigration law.[78] ICE has the largest budget among the

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[70] *See, e.g.*, Homeland Security Act of 2002, 6 U.S.C. § 101 (2006).

[71] *Id.*

[72] U.S. Citizenship and Immigration Services, http://www.uscis.gov/portal/site/uscis (last visited Apr. 15, 2010).

[73] *See generally id.*

[74] U.S. Customs and Border Patrol, http://www.cbp.gov/xp/cgov/home.xml (last visited Apr. 15, 2010); U.S. Immigration and Customs Enforcement, http://www.ice.gov/ (last visited Apr. 15, 2010).

[75] *See generally* U.S. Customs and Border Patrol, *id*.

[76] *See generally id.*

[77] Customs & Border Patrol (CBP), Organization Chart, http://www.cbp.gov/linkhandler/cgov/about/organization/orgcha1.ctt/orgcha1.pdf (2009).

[78] *See generally* U.S. Immigration and Customs Enforcement, *supra* note 74.

three immigration units and more than 17,000 employees.[79] ICE has five key divisions, including the Federal Protective Service, an intelligence office, an investigations office, an international affairs office and an office devoted to detention and removal.[80]

Following reorganization, the immigration court system was retained in the Department of Justice under a unit called the Executive Office for Immigration Review (EOIR) while the function of issuing visas remained at the State Department.[81] The Homeland Security Act resulted in additional jurisdictional and substantive changes with regard to the care and custody of unaccompanied minor children, oversight of individual and systemic abuses or misconduct by DHS officers and its contractors, and related matters.[82] While the transfer of immigration enforcement authorities out of the Department of Justice and into the Department of Homeland Security may have provided the EOIR with a higher degree of decisional independence, the shift did not necessarily provide EOIR with greater authority to exercise this independence.[83] As described by Cox and Rodriguez:

> [T]his effort to insulate decisions regarding relief from the prosecutorial arm of the immigration agencies has been undermined by the recent changes to the relief provisions. Those changes have had the effect of shifting more aspects of the deportation decision back to ICE. Thus, far from eliminating discretion, the statutory restrictions on discretionary relief have simply consolidated this discretion in the agency officials responsible for charging decisions. Prosecutorial discretion, rather than the exercise of discretion by immigration judges has become the norm.[84]

Despite the transfer and merger of core immigration units into a new

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[79] *See generally* U.S. ICE, Management and Budget Fact Sheets, http://www.ice.gov/pi/news/factsheets/index.htm (last visited Apr. 15, 2010).

[80] About U.S. ICE, http://www.ice.gov/about/index.htm (last visited Apr. 15, 2010).

[81] *See generally* U.S. Dep't of Justice, Executive Office of Immigration Review, http://www.usdoj.gov/eoir/ (last visited Apr. 15, 2010); U.S. Dep't of State, Visa Documents, http://www.state.gov/misc/59452.htm (last visited Apr. 15, 2010).

[82] U.S. Dep't of Health & Human Serv., Admin. for Children & Families, http://www.acf.hhs.gov/programs/orr/ (last visited Apr. 15, 2010); Dep't of Homeland Sec., Office for Civil Rights and Civil Liberties, http://www.dhs.gov/xabout/structure/editorial_0371.shtm (last visited Apr. 15, 2010); U.S. Dep't of Justice, Executive Office of Immigration Review, *id*.

[83] Cox & Rodriguez, *supra* note 68, at 49.

[84] *Id.* at 50.

cabinet level department, and absence of a particular individual to oversee the arguably competing missions and cultures of the new immigration units, the Meissner memo and principle of prosecutorial discretion survived the move.[85]

The foregoing summary about how INS was overhauled and reorganized into the DHS is by no means complete but provides an important foundation for understanding the varying locations and individuals who possess the great power of prosecutorial discretion. Subsequent written memos issued by UCIS, CBP and ICE have been in keeping with, referenced, or in some cases explicitly reaffirmed the Meissner memo.[86] For example, in January 2003, former USCIS Executive Associate Commissioner Johnny N. Williams issued a memo to Regional Directors, Deputy Executive Associate Commissioner, Immigration Services and General Counsel advising officers of their authority to refrain from bringing charges against noncitizens who are both a beneficiary of such benefits and potentially in violation of immigration laws as a consequence of their unlawful presence.[87] In this scenario, the Williams memo reminds officers that they may refrain from charging such noncitizens and calculate humanitarian and other factors when making such a determination.[88] The Williams memo also instructs officers to review the Meissner memo.[89] Moreover, in September 2003, former USCIS Associate Director for Operations William Yates issued a memo to Regional Directors and Service Center Directors discussing their authority to issue charging documents to noncitizens, and reminding Directors that every decision must be made in accordance with the Meissner memo.[90]

Similarly, in October 2005, former ICE Principal Legal Advisor William J. Howard issued a memo to all OPLA (Office of the Principal Legal Advisor) Chief Counsel highlighting the limited resources of ICE and position that "…the universe of opportunities to exercise prosecutorial discretion is large."[91] The Howard memo lists scenarios during which an

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[85] *For an excellent discussion and critique of the INS reorganization and related recommendations, see* David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, INSIGHT (Migration Policy Institute), Apr. 2003, available *at* http://www.migrationpolicy.org/insight/insight_4-2003.pdf.

[86] *See, e.g.,* Memorandum from Johnny N. Williams, Executive Associate Commissioner of the Office of Field Operations of the U.S. Immigration and Naturalization Service, on Family Unity Benefits and Unlawful Presence (Jan. 27, 2003) (available at http://www.aila.org).

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] Memorandum from William R. Yates, Associate Director for Operations of U.S. Dep't of Homeland Sec., Citizenship and Immigration Services, on Service Center Issuance of Notice to Appear (Form I-862) (Sept. 12, 2003).

[91] Memorandum from William J. Howard, Principal Legal Advisor for U.S. ICE, on Prosecutorial

officer's "favorable" exercise of discretion would be appropriate such as discouraging the issuance of charging papers to noncitizens with viable family petitions or green card applications and those with sympathetic factors such as parents of citizen children with a serious medical condition.[92] The Howard memo also offers possible scenarios for deferring enforcement even after charging papers have been filed.[93] Overall, the Howard memo preserves many of the same principles echoed by the former INS. "Prosecutorial discretion is a very significant tool …to deal with the difficult, complex and contradictory provisions of the immigration laws and cases involving human suffering and hardship."[94]

More recently, in November 2007, former ICE Assistant Secretary Julie Myers issued guidance to all field office directors and special agents in charge, advising them to release apprehended nursing mothers absent national security or public safety or other investigative interests.[95] In the memo, Myers reminds officers that "[t]he process for making discretionary decisions is outlined in the [Meissner memo] …Field agents and officers are not only authorized by law to exercise discretion within the authority of the agency but are expected to do so in a judicious manner at all stages of the enforcement process."[96] In response to criticisms surrounding ICE's large scale arrest of 250 workers at a leather shoe factory in New Bedford, MA and following meaningful negotiations with the late Senator Edward Kennedy, a Democrat from Massachusetts and then Chairman of the Senate Judiciary Committee, and Representative William Delahunt, a Democrat from Massachusetts, ICE issued a memo in November 2007 entitled "Guidelines for Identifying Humanitarian Concerns among Administrative Arrestees When Conducting Worksite Enforcement Operations."[97] While the guidelines were crafted more as instructions to front line officers after ICE exercised its authority to investigate and carryout what were largely worksite enforcement actions, (which arguably is, in and of itself a discretionary determination) some of the guideline's language relates squarely with exercising prosecutorial discretion based on

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Discretion 2 (October 24, 2005), *available at* www.shusterman.com/pdf/ice-pdmemo1005.pdf.

[92] *Id.* at 3–4.

[93] *Id.* at 5–6.

[94] *Id.* at 8.

[95] Memorandum from Julie L. Myers, Assistant Secretary of Homeland Security for Immigration and Customs Enforcement, on Prosecutorial and Custody Discretion (Nov. 7, 2007) (*available at* http://www.bibdaily.com/pdfs/AS%20MYERS%20MEMO%20RE%20PROSECUTORIAL%20AND%20CUSTODY%20DISCRETION.pdf).

[96] *Id.*

[97] Press Release, Kennedy, Delahunt Announce New Guidelines for Immigration Raids (Nov. 16, 2007), *available at* http://kennedy.senate.gov/newsroom/press_release.cfm?id=0F91969E-96EB-4AB1-832B-2CF42451B587. *See also* Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853 (2008).

individual circumstances.[98]

D. Deferred Action under the Department of Homeland Security

Notably, the Department of Homeland Security has maintained the deferred action program of the former INS.[99] Pursuant to FOIA requests, Leon Wildes obtained deferred action records from the Eastern and Central Regional Offices of the Bureau of Citizenship and Immigration Services (now United States Citizenship and Immigration Services, or USCIS).[100] Specifically, Wildes studied data on 499 approved, removed and denied cases under the deferred action program.[101] This data is current through April 2003.[102] In both the central and eastern regional offices, approximately eighty-nine percent of the cases were approved.[103] In most of the cases reviewed by Wildes, decisions took the form of a terse statement without explaining the overriding factor influencing the decision.[104] Nevertheless, the existence of potential separation from family and/or an existing physical infirmity was a major factor in deferred action adjudications.[105] Wildes observes:

> In light of the fact that these cases involve alien spouses who are completely reliant on public assistance and receive state-funded medical care, it is striking that the government approved them for deferred action status. This fact exemplifies that the humanitarian goal of deferred action take precedence over the usual concerns of the INS, which removes aliens who have become a burden upon United States resources and thus become subject to the public charge provision, another distinct ground removal.[106]

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[98] Press Release, Kennedy, Delahunt Announce New Guidelines for Immigration Raids, *id*; *See also* Wadhia, *id*., at 881.

[99] *See, e.g.,* Memorandum from William J. Howard, Principal Legal Advisor for U.S. Immigration and Customs Enforcement, on Exercising Prosecutorial Discretion to Dismiss Adjustment Cases (October 6, 2005), *available at* www.assistahelp.org/VAWA/Howard-10-6-05.pdf; ALEINIKOFF, *supra* note 4, at 778 (citing to the INS Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal, Part X).

[100] Wildes, *Deferred Action*, *supra* note 8, at 825.

[101] *Id.* at 826.

[102] *Id.* at 827.

[103] *Id.* at 826.

[104] *Id*. at 829.

[105] Wildes, *Deferred Action*, *supra* note 8, at 831.

[106] *Id.* at 832.

The 2003 data also reveals that separation from family and negative publicity, when coupled with other factors such as a medical condition, influenced grants of deferred action.[107] One striking difference in Wildes' 1976 study is the higher number of grants for noncitizens who were mentally infirm, or who had criminal histories due to drug convictions, as compared to the 2003 data.[108] Ultimately, comparing the 1976 data with the 2003 data provides limited utility since the sample collected in the former contained only grants of deferred action while the sample collected in the latter was quantitatively smaller and contained grants, denials and removals.[109]

In April 2007, Prakash Khatri, then Ombudsman of the United States Citizenship and Immigration Services issued a "Recommendation" on deferred action, highlighting the history and authority for deferred action and recommending that the USCIS publicize and maintain statistics on the deferred action program.[110] The Recommendation reasoned that tracking deferred action cases would increase consistency in adjudications.[111] As to the public benefit, Khatri noted:

> This recommendation seeks to improve customer service by making basic information on deferred action requests clear to the public: where to submit a request, what to include with a submission, and the general criteria for requests to be approvable. Implementation of this recommendation would prevent customers from having to guess where and what information to submit. It also would prevent officers in the field from providing misinformation about where a request for deferred action should be submitted. This recommendation also seeks to ensure that over time and in different regions, cases are similarly decided.[112]

Then USCIS Director Emilio Gonzalez issued a response in August 2007.[113] With regard to posting information about the deferred action

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[107] *Id.* at 835.

[108] *Id.* at 833, 836–37.

[109] *Id.* at 838.

[110] Recommendation from Prakash Khatri, CIS Ombudsman, to Dr. Emilio T. Gonzalez, Director USCIS on Deferred Action (Apr. 6, 2007), *available at* http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf.

[111] *Id.*

[112] *Id.* at 3.

[113] Memorandum from Dr. Emilio T. Gonzalez, Director U.S. Citizenship and Immigration

program on the USCIS website, Gonzalez responded:

> Deferred action is a discretionary action initiated at the discretion of the agency or at the request of the alien, rather than an application process. Since deferred action requests are reviewed on a case-by-case basis and granted only in extraordinary circumstances, USCIS does not believe that general information about the deferred action process would be a meaningful addition to the website.[114]

As to tracking deferred action cases, Gonzalez concluded that future deferred action grants would be monitored by the Regional Directors and reported to USCIS Headquarters.[115] However, Gonzalez did not believe it was necessary for USCIS Headquarters to track and review deferred action cases to ensure consistency among regions.[116] Finally, USCIS agreed that clarifying guidelines on deferred action for USCIS and ICE officers would be beneficial.[117] The foregoing correspondence is notable and reflects a tension about whether deferred action should operate as an internal guideline or a rule. Whereas Khatri recommended a policy on deferred action that would appear like a rule and benefit, Gonzalez cautiously avoided this characterization.

More recently, deferred action has been applied at a macro level. In June 2009, DHS publicly announced that it would extend deferred action to widows and widowers of U.S. citizens— as well as their unmarried children under 21 years old— who reside in the United States and who were married for less than two years prior to their spouse's death.[118] In a related press release, DHS identified the contours of deferred action: "Deferred action is generally an act of prosecutorial discretion to suspend removal proceedings against a particular individual or group of individuals for a specific timeframe; it cannot resolve an individual's underlying immigration status."[119] Deferred action has also been granted on an individual basis to select "DREAM Act" students.[120] The Development,

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Service, to Prakash Khatri, U.S. Citizenship and Immigration Service Ombudsman, on Response to Recommendation #32, Deferred Action (Aug. 7, 2007), *available at* http://www.dhs.gov/xlibrary/assets/cisombudsman_rr_32_o_deferred_action_uscis_response_08-07-07.pdf.

[114] *Id.* at 1.

[115] *Id.* at 2.

[116] *Id.*

[117] *Id.*

[118] Press Release, Dep't of Homeland Sec., DHS Establishes Relief for Widows of U.S. Citizens (June 9, 2009), *available at* http://www.dhs.gov/ynews/releases/pr_1244578412501.shtm.

[119] *Id.*

[120] Development, Relief, and Education for Alien Minors Act of 2009, S. 729, 111th Cong.

Relief, and Education for Alien Minors Act, or DREAM Act, refers to pending federal legislation that would regularize the immigration status of select immigrant students who have graduated from a United States high school, have a record of "good moral character," have been continuously present in the United States, and entered the United States at a tender age.[121]

Prosecutorial discretion has also historically been applied to groups or classes of individuals through "Extended Voluntary Departure," or EVD. Like with deferred action, EVD does not have a statutory basis nor is there an application form or process. Instead, the program "permits the AG in his discretion to temporarily enjoin the removal from particular countries who fear return because of sudden political changes in their countries of origin or other reasons."[122] In the past, the Attorney General has established an EVD program for citizens of Poland, Cuba, the Dominican Republic, Chile, Cambodia, Vietnam, among others.[123] Another formulation of the EVD program is called "Deferred Enforcement Departure," or DED. DED can be utilized by the President to temporarily safeguard classes of individuals from removal. As described by DHS: "Although DED is not a specific immigration status, individuals covered by DED are not subject to enforcement actions to remove them from the United States, usually for a designated period of time."[124] Notably, President Barack Obama signed a Memorandum for the Secretary of Homeland Security in March 2009 extending DED for qualified Liberians.[125] It is worth noting that EVD is rarely used today due in part to the fact that many of the benefits of EVD now have a statutory basis

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(2009). *See, e.g.*, Dream Activist-News Flash: Taha Receives Deferred Action, http://www.dreamactivist.org/news-flash-taja-recieves-deffered-action (last visited Apr. 15, 2010).

[121] *Id. See also* Dream Activist, http://www.dreamactivist.org/ (last visited Apr. 15, 2010).

[122] IRA KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 493 (11th ed. 2009). *See also* Hotel and Restaurant Employees Union Local v. Smith, 846 F.2d 1499, 1501 (D.C. Cir. 1988).

[123] KURZBAN, *id.* at 493.

[124] U.S. DEP'T OF HOMELAND SEC., FACT SHEET, LIBERIANS PROVIDED DEFERRED ENFORCED DEPARTURE (DED) (Sep. 19, 2007), *available at* http://www.dhs.gov/xnews/releases/pr_1189693482537.shtm; *see also* U.S. CITIZENSHIP & IMMIGRATION SERVICES, AFFIRMATIVE ASYLUM PROCEDURES MANUAL 57 (Nov. 2007), *available at* http://www.uscis.gov/files/nativedocuments/AffrmAsyManFNL.pdf. "Deferred Enforced Departure (DED) grants certain qualified citizens and nationals of designated countries a temporary, discretionary, administrative protection from removal from the United States and eligibility for employment authorization for the period of time in which DED is authorized. The President determines which countries will be designated based upon issues that may include, but are not limited to, ongoing civil strife, environmental disaster, or other extraordinary or temporary conditions. The decision to grant DED is issued as an Executive Order or Presidential Memorandum."

[125] Memorandum on Deferred Enforced Departure for Liberians (Mar. 20, 2009), *available at* http://www.uscis.gov/files/article/Liberia_26mar2009.pdf.

through a program called "Temporary Protected Status."[126]

For more than sixty years, the immigration agency has applied the theory of prosecutorial discretion to individuals and groups. While the agency's historical application of prosecutorial discretion has in many cases been legitimately driven by resource and humanitarian considerations, the absence of oversight, accountability and transparency by the agency has negatively impacted undocumented noncitizens and their families. Moreover, the agency's unwillingness to recognize deferred action as an available benefit worthy of public disclosure is troubling. The practical implication is that undocumented noncitizens are prevented from requesting for deferred action or challenging instances where the agency has failed to grant deferred action.

III. LESSONS FROM CRIMINAL LAW

A. History and Description of Prosecutorial Discretion in the Criminal System

There is little disagreement among criminal law and justice scholars that the American prosecutor enjoys wide power and discretion. In fact, one scholar has relied on historical analyses to conclude that the American prosecutor holds discretionary power "unmatched in the world."[127] The prosecutor carries a discretionary role at many important stages of the criminal process including whether to bring an arrest, when to file charges, whether to bring charges under federal or state law, or whether an existing charge should be dissolved.[128] As articulated by Angela Davis, "Prosecutors are the most powerful officials in the criminal justice system because they alone decide whether to charge a person with a crime, what charges to bring, and when to accept a plea to a lesser offense."[129]

For years, criminal law scholars have written about the history, power

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[126] INA § 244(a), 8 U.S.C. § 1254(a) (2006).

[127] Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 LAW & SOC'Y REV. 291, 292 (1987). *See also* ANGELA J. DAVIS, ARBITRARY JUSTICE (2007); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001) [hereinafter Davis, *American Prosecutor*]; Angela J. Davis, *They Must Answer for What They've Done*, LEGAL TIMES, Aug. 2007, at 2 [hereinafter Davis, *They Must Answer*]; KENNETH CULP DAVIS, POLICE DISCRETION (1975). *See also* Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, JUST. Q., Apr. 2009, at 1–2 ("Importantly, these early case processing decisions are not controlled by the sentencing judge, but instead fall under the auspices of the one of the most powerful and least researched members of the federal courtroom workgroup- the U.S. Attorney."); *Id.* at 5 ("Few criminal justice pundits would disagree that the prosecutor is one of the most, if not the most influential and power persons in the criminal justice system.").

[128] *See, e.g.,* Shermer & Johnson, *id.*, at 5.

[129] Davis, *They Must Answer*, *supra* note 127, at 2.

and abuse of prosecutorial discretion.[130] The term prosecution was developed in England and America in the context of a private prosecution system. Before the American Revolution, the arrest and prosecution of potential wrongdoers fell on the crime victims' as such victims literally performed the role of the prosecutor (or hired a private advocate to do the same), investigating and building a case before a trial.[131] Punishment was in the form of services to the victim or imprisonment at the victim's expense.[132] The population growth in colonial America came with a growth in criminal activity, causing private victims to resort to settlements instead of trial and overall chaos in the system. The birth of public prosecutions was preceded by a practical desire to prevent abuses and a philosophical position about crime and society.[133]

The first public prosecutor was an "Attorney General" appointment in Virginia in 1643.[134] The Judiciary Act of 1789 created the first federal office of the attorney general and district attorneys, though without a clear configuration or hierarchy.[135] Thereafter, "crime" commissions were developed to study the criminal justice system.[136] In particular, the Wickersham Commission identified abuses with prosecutorial power and discretion and made practical recommendations.[137] In 1931 the Wickersham Commission wrote, "[i]n every way the prosecutor has more power over the administration of justice than the judges, with much less public appreciation of his power. We have been jealous of the power of the trial judge, but careless of the continual growth of the power of the prosecuting attorney."[138] Davis argues that despite the findings and recommendations of the Wickersham Commission, other commissions, and legal scholars, there has been no significant reform of the prosecutorial process.[139] According to Davis, prosecutors retain even more power,

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[130] *See, e.g.,* DAVIS, ARBITRARY JUSTICE, *supra* note 127; Davis, *They Must Answer*, *supra* note 127; Davis, *American Prosecutor*, *supra* note 127; Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837 (2004); Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309 (2002); Albonetti, *supra* note 127; Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

[131] DAVIS, ARBITRARY JUSTICE, *supra* note 127, at 9.

[132] *Id*. at 10.

[133] *Id.* at 10.

[134] *Id.*

[135] *Id.* at 11.

[136] DAVIS, ARBITRARY JUSTICE, *supra* note 127, at 11.

[137] *Id.* at 12.

[138] JOAN E. JACOBY, THE MINNESOTA COUNTY ATTORNEY'S ASSOCIATION, THE AMERICAN PROSECUTOR IN HISTORICAL CONTEXT, *available at* http://www.mcaa-mn.org/docs/2005/AmericanProsecutorHistoricalContext52705.pdf.

[139] DAVIS, ARBITRARY JUSTICE, *supra* note 127, at 12.

independence, and discretion than they did in the nineteenth century.[140]

Like with immigration enforcement, there are many stages of the criminal process. The police officer carries the power to arrest. Thereafter, the prosecutor decides whether and what kind of charges to file. If a prosecutor decides not to bring charges, the person is free to go.[141] Federal courts must utilize the grand jury process for felony charges. This means that the citizen-jurors together must decide whether there is probable cause to believe that a defendant committed a felony offense.[142] While it may appear that the grand jury serves as an important "check" to the arresting police officer and prosecutor in determining whether a formal charge should be made, some scholars argue that it is the prosecutor who actually controls the grand jury process.[143] Another routine practice among prosecutors is "overcharging," which places the prosecutor in a greater bargaining position during the "plea bargaining" stage and also provides him with a "plan B" in case the defendant is not convicted on the primary charge.[144]

Plea bargaining is another stage during which prosecutors hold a great amount of discretion. In light of the fact that most criminal defendants enter into guilty pleas, if the crimes carry a mandatory minimum sentence, it is accurate to conclude, as Davis does, that the charging and plea bargaining stages of the criminal process largely determine the defendant's fate.[145] Another complex issue in criminal cases is the relationship between the crime victim and the prosecutor. Davis advises that while the prosecutor should support crime victims, his obligations are broader and may potentially conflict with the victim's goals.[146] Notably, prosecutors also control "death penalty" cases to the extent that only a prosecutor, as

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[140] *Id.* at 12. The power of the American prosecutor was echoed by former Attorney General Robert H. Jackson. James K. Robinson, *Restoring Public Confidence in the Fairness of the Department of Justice's Criminal Justice Function*, 2 HARV. L. & POL'Y REV. 237, 239–40 (2008).

[141] DAVIS, ARBITRARY JUSTICE, *supra* note 127, at 23.

[142] *Id.* at 25.

[143] *See, e.g.*, *id*. at 26. *See also*, Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 3 (1999); Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 122 (1995); Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2336 n.4 (2008) ("grand jury review represents, at best, 'a modest screening power, a fact recognized by the familiar courthouse saying that a grand jury would indict a ham sandwich if the prosecutor asked it do so.') (citing to Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 51 n.70 (2002)).

[144] DAVIS, ARBITRARY JUSTICE, *supra* note 127, at 31.

[145] *Id.* at 56. *See also* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471 (1993) (discussing the exercise of discretion in plea bargaining); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 268–75 (2001) (discussing discretion in the plea bargaining and charging stages).

[146] DAVIS, ARBITRARY JUSTICE, *supra* note 127, at 76.

opposed to a judge or a more neutral party, can decide whether to seek the death penalty in a particular case.[147]

B. Application of Criminal Prosecutorial Discretion to Immigration Context

An analysis of prosecutorial discretion in the criminal context is valuable on at least four levels. First, the cost and justice-related theories behind prosecutorial discretion in the criminal justice context and the civil immigration context are similar. Second, both the criminal and civil immigration arenas have witnessed an explosion of activities that qualify as infractions subject to penalties. Third, the immigration agency INS/DHS has historically relied on documents produced and utilized in the criminal context to create guidance for immigration officers. Finally, the surge in immigration-related criminal prosecution raises a number of questions about how prosecutorial discretion is exercised against noncitizens in both the criminal and civil contexts. These four points are discussed in turn below.

1. Cost and Justice-Related Theories are Similar

As in the civil immigration context, the historical arguments and rationale for prosecutorial discretion in the criminal context are largely grounded in efficiency and justice. As stated by former Attorney General Robert H. Jackson before the Conference of United States Attorneys in 1940, "[n]o prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. . .."[148] The justice-related rationale behind prosecutorial discretion is explained in the United States Attorney Manual's opening chapter on principles of federal prosecution:

> The manner in which Federal prosecutors exercise their decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens. A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances— recognizing both that serious violations of Federal law must be prosecution, and

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[147] *Id.* at 78.

[148] Robinson, *supra* note 140, at 239.

> that prosecution entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results.[149]

The USAM highlights the importance for each Federal prosecutor to be guided by the principles set forth in the manual, but permits a departure from such principles if necessary in "the interests of fair and effective law enforcement within the district."[150]

Both the USAM and the Meissner memo utilize a "substantial federal interest" standard focusing on both costs and justice.[151] Specifically, the standard identifies the following considerations for determining whether prosecution should be declined: 1) federal law enforcement priorities, 2) nature and seriousness of the offense, 3) the deterrent effect of prosecution, 4) sufficiency of evidence to prove culpability, 5) prior criminal history, 6) willingness to cooperate with investigations or prosecutions of others, and 7) the potential sentence and related consequences if convicted.[152]

As in the Meissner memo, the USAM notes that not every factor needs to be complied with in order for a federal prosecutor to decline prosecution.[153] In discussing the nature and seriousness of offense, the USAM notes that "[i]t is important that limited federal resources not be wasted in prosecuting inconsequential cases or cases in which the violation was technical."[154] Illustrating this point, Davis comments on the discretion used by police each time someone commits a traffic violation.[155] She argues that few people would be supportive of a law that required police officers to issue tickets to every person who committed a traffic violation.[156] Davis also argues that the populace would assent that officers should preserve their limited resources for "more serious offenses" than traffic-related ones.[157] Moreover, the USAM states that "[e]conomic, physical, and psychological considerations are also important in assessing the impact of the offense on the victim. In making this connection, it is appropriate for the prosecutor to take into account such matters as the victim's age or health, and whether full or partial restitution has been

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[149] PRINCIPLES OF FEDERAL PROSECUTION, U.S. ATTORNEY'S MANUAL § 9-27.001 (1997).

[150] U.S. ATTORNEY'S MANUAL § 9-27.140(A) (1997).

[151] U.S. ATTORNEY'S MANUAL § 9-27.220 (1997).

[152] U.S. ATTORNEY'S MANUAL § 9-27.230(A) (1997).

[153] *Id.*

[154] U.S. ATTORNEY'S MANUAL § 9-27.230(B) (1997).

[155] DAVIS, ARBITRARY JUSTICE, *supra* note 127, at 6.

[156] *Id.*

[157] *Id.*

made."[158] It also describes personal factors of the accused such as "extreme youth, advanced age, mental or physical impairment" as potential reasons to decline prosecution.[159] While the content of the USAM guidelines are notable, Davis critically notes that these guidelines are not legally binding, and therefore do not establish accountability.[160]

2. Explosion of Activities that Qualify as Infractions

Much like the 1996 immigration laws heightened the importance of prosecutorial discretion in the immigration context, so too did the preservation and growth of criminal statutes in the criminal context. Davis describes an instance in which prosecutorial discretion can affect the application of a preserved criminal statute:

> Legislatures pass laws criminalizing a vast array of behaviors, and some of these laws, such as fornication and adultery for example, stay on the books long after social mores about these behaviors have changed. In addition, some offenses warrant prosecution in some instances but not others. For example, it may be reasonable to bring a prosecution in a jurisdiction that criminalized gambling for someone engaged in a large scale operation but not for individuals placing small bets during a Saturday night poker game in a private home.[161]

Cox and Rodriguez argue that the President has assumed enormous power over immigration matters primarily through: 1) inherent executive authority, 2) formal mechanisms of congressional delegation, and 3) de facto delegation.[162] Focusing on de facto delegation, they conclude that the criminal justice system bears a meaningful resemblance to the civil immigration one to the extent that the "laws on the books makes everyone a felon."[163] Namely, it is the sheer breadth of immigration sanctions and the under-enforcement of these sanctions that have together created broad de facto delegation.[164] Cox and Rodriguez conclude, "[t]he trends have

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[158] U.S. ATTORNEY'S MANUAL § 9-27.230(B) (1997).

[159] *Id.*

[160] DAVIS, ARBITRARY JUSTICE, *supra* note 127, at 18.

[161] *Id.* at 13.

[162] Cox & Rodriguez, *supra* note 68, at 3.

[163] *Id.* at 45 n.147.

[164] *Id.* at 45 ("First, a huge fraction of the noncitizen population is deportable as a technical legal matter. Second, while vast numbers of noncitizens are deportable, only a tiny fraction will ever be placed in removal proceedings. Third, the immigration agencies wield the same power as criminal

made administration of immigration law look more and more like the administration of criminal law, where charging decisions rather than either the formal legal rules or the exercise of judicial discretion determine who is deported and what collateral consequences attach to deportation."[165]

3. Reliance on Documents Utilized in the Criminal Context

As a practical matter, in developing the prosecutorial guidelines applicable to immigration officers, the former INS General Counsel and the former Commissioner have relied heavily on principles of prosecutorial discretion in the criminal context.[166] For example, former General Counsel for the Immigration and Naturalization Service Bo Cooper drafted a memorandum on prosecutorial discretion noting that, "[t]he idea that prosecutor is vested with broad discretion in deciding when to prosecute and when not to prosecute is firmly entrenched in American law."[167] In addition to the costs and justice arguments, the memorandum identifies a third important rationale for discretion in the criminal context, namely the legislative "overcriminalization," which means the longevity of criminal statutes that in modern society may not necessarily be conceived of as a "crime."[168]

Similarly, the Meissner memo relies on the U.S. Department of Justice's United States Attorneys' Manual's Principles of Federal Prosecution.[169] As explained earlier, the Principles of Federal Prosecution governing the conduct of U.S. Attorneys use the concept of a "substantial Federal interest."[170] Based on this principle, the Meissner memo states, "As a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial."[171] Referencing the USAM, The Meissner memo lists some beneficial aspects of such principles:

> [s]uch principles provide convenient reference points for the process of making prosecutorial decisions; facilitate

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prosecutors to make selective charging decisions. In this way, the structure of immigration system delegates tremendous power to the executive branch.").

[165] *Id.* at 50.

[166] *See* Bo Cooper, *supra* note 54; Doris Meissner, *supra* note 3.

[167] Bo Cooper, *supra* note 54, at 2 (citing WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.2 (2d ed. 1992)).

[168] *Id*.

[169] Doris Meissner, *supra* note 3, at 2.

[170] U.S. ATTORNEY'S MANUAL, *supra* note 151.

[171] Doris Meissner, *supra* note 3, at 5.

> the task of training new officers in the discharge of their duties; contribute to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices and between their activities and the INS's law enforcement priorities; make possible better coordination of investigative and prosecutorial activity by enhancing the understanding between the investigative and prosecutorial components; and inform the public of the careful process by which prosecutorial decisions are made.[172]

4. Surge in Immigration-Related Criminal Prosecutions

Related to the foregoing discussion about the application of prosecutorial discretion in the criminal and immigration contexts, is the striking increase of *criminal* immigration prosecutions over the last decade.[173] Contrast this with *civil* immigration violations, which as the name suggests, are not classified as "crimes" in the formal sense. For example, an individual who enters the United States as a full-time student and who during the second semester works without authorization can be charged civilly based on her failure to maintain the terms of her visa.[174] However, the nature of some offenses that are legally classified as a "criminal" immigration violation is not necessarily violent or "criminal" in the ordinary meaning of the word. To illustrate, an individual who enters the United States one time without inspection can be prosecuted under the criminal law.[175] Finally, some immigration-related transgressions can be prosecuted as both a civil immigration offense and a criminal one.[176] For instance, the immigration statute makes the failure to notify the government of a change of address within 10 days of moving both a civil offense, for which a noncitizen may be removed, as well as a criminal offense, for which a noncitizen may be fined up to $200 and imprisoned

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[172] *Id*. at 2.

[173] *See, e.g.,* TracImmigration, Immigration Convictions for December 2009, http://trac.syr.edu/tracreports/bulletins/immigration/monthlydec09/gui/ (last visited Apr. 15, 2010); Julia Preston, *More Illegal Crossings Are Criminal Cases, Group Says*, N.Y. TIMES, June 18, 2008, at A14; *Hearing on the Arrest, Prosecution, and Conviction of Undocumented Workers in Postville, Iowa from May 12 to 22, 2008*, H. Comm. on the Judiciary (2008) (Statement of David Wolfe Leopold, American Immigration Lawyers Ass'n); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007).

[174] *See, e.g.,* INA § 237, 8 U.S.C. § 1227 (2006).

[175] 8 U.S.C. § 1325 (2006).

[176] *See, e.g*., INA §§ 265, 266, 274(c), 8 U.S.C. §§ 1305, 1306, 1324(c) (2006).

for up to 30 days.[177]

Notably, there are nearly 5,800 federal prosecutors in the more than 90 United States attorney's offices.[178] In 2007, 68,000 federal criminal cases were filed, of which 17,000 were immigration-related.[179] The percentage of immigration-related prosecutions increased in 2008, reaching an all time high of 49.2 percent of all prosecutions.[180] Moreover, data from the United States Department of Justice and analyzed by the Syracuse University-based Transactional Records Access Clearinghouse (TRAC) shows that the government reported 8,813 new immigration convictions during January 2009, reflecting an 97 percent increase from similar convictions of the same time period in the previous year.[181] The TRAC study highlights the spike in immigration convictions, stating that such convictions increased by 219 percent from 2004.[182]

Most immigration-related prosecutions are brought by components of DHS under three sections contained in Title 8 of the United States Code: Bringing in and harboring certain aliens, Entry of alien at improper time or place, and Reentry of deported aliens.[183] Talking to the *Dallas Morning News* in early 2009, former U.S. Attorney Richard Roper stated that as the docket of immigration cases increases, "[t]he practical effect is it hurt our ability to prosecute white-collar fraud." He continued, "If we don't do them in the U.S. attorney's office they won't get done because they are so

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[177] INA § 266(b), 8 U.S.C. § 1306(b) (2006). "Any alien or any parent or legal guardian in the United States of any alien who fails to give written notice to the Attorney General, as required by section 265 of this title, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $200 or be imprisoned not more than thirty days, or both. Irrespective of whether an alien is convicted and punished as herein provided, any alien who fails to give written notice to the Attorney General, as required by section 265, shall be taken into custody and removed in the manner provided by chapter 4 of this title, unless such alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful."

[178] Daniel C. Richman, *Political Control of Federal Prosecutions—Looking Back and Looking Forward* 2088 (Columbia Law Sch. Pub. Law & Legal Theory, Working Paper No. 08-187, 2008), *available at* http://ssrn.com/abstract=1289434. *See also* Dep't of Justice, United States Attorneys Mission Statement, http://www.usdoj.gov/usao/ (listing the number of U.S. Attorneys) (last visited Apr. 15, 2010).

[179] Richman, *id.* at 2088.

[180] *Id.*

[181] TracReports, Prosecutions for Jan. 2009, Immigration and Customs in Homeland Security, http://trac.syr.edu/tracreports/bulletins/hsaa/monthlyjan09/fil/ (last visited Apr. 15, 2010). Please note that this data is continually updated, and the above numbers may no longer be accurate at the time of publication.

[182] *Id.* More recent data shows that in May 2009 ICE referred 2147 new prosecutions to the DHS, showing an increase by 18.9 percent from the previous month. According to TRAC, "These data suggest that at least through the first five months of the Obama Administration there has been no let up in the increase in criminal prosecutions as a result of ICE's enforcement activities." TracReports, ICE Criminal Prosecutions Continue to Rise Under Obama, http://trac.syr.edu/immigration/reports/216/ (last visited Apr. 15, 2010).

[183] TracReports, *supra* note 181.

labor-intensive. It is difficult for the local district attorney's office to handle that."[184]

The foregoing analysis raises important questions about prosecutorial discretion in both the criminal and civil contexts. For example, what does the fact that nearly one half of federal prosecutions have been immigration-related which, in effect reduced the number of white-collar prosecutions, suggest about the government's use of resources and priorities? As in the criminal context, are there outdated or somewhat excessive civil immigration punishments in the INA that call for DHS to modify the current guidance on prosecutorial discretion? Does the surge in immigration-related prosecutions call for the Department of Justice to modify its current guidance on prosecutorial discretion so that precious criminal law enforcement resources are not disproportionately spent on immigration-related misdemeanors at the expense of prosecuting serious felonies?

C. Differences Between Prosecutorial Discretion in the Criminal and Immigration Contexts

There are two important differences between prosecutorial discretion in the criminal context and the immigration arena. First, the differing legal procedures and standards between criminal and civil immigration systems are notable. In the criminal context, police officers bear the power to arrest while the prosecutor holds authority to bring charges against a particular individual. Contrast this with the immigration context, where the immigration officer bears both the power to arrest and the power to bring charges.[185] Moreover, in the criminal system, a defendant is generally required to come before a judge or magistrate within 48 hours.[186] Under the immigration system, the regulations contain a 48 hour timeframe for making a charging or custody determination.[187] However, the regulation also contains an exception to the 48 hour rule "in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time."[188] Similarly, neither the regulations nor the INA contain a timeframe for serving an arrested noncitizen with charging papers, or NTA, or filing such papers with the immigration court. In most cases,

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[184] Dianne Solis, *Immigration Prosecutions Surge Under Bush's Watch*, DALLAS MORNING NEWS, Jan. 13, 2009, *available at* http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/011309dnmetimmigprosecute.404437c.html.

[185] *See generally* INA § 287, 8 U.S.C. § 1357 (2006); 8 C.F.R. § 287 (2009).

[186] DAVIS, ARBITRARY JUSTICE, *supra* note 127, at 24.

[187] 8 C.F.R. § 287.3(d) (2009).

[188] *Id.*

immigration defendants will not see a judge until the NTA is filed with the court and the initial hearing is scheduled. Furthermore, unlike the criminal system, the civil immigration system does not include a grand jury to secure felony charges. Finally, people who are charged with crimes are normally represented by a public defender at the government's expense.[189] Contrast this with the civil immigration system, where noncitizens facing removal are not provided a government attorney but may secure counsel at their own expense. The practical effect is that most noncitizens and unlawfully held United States citizens navigate the removal process and related court hearings alone.[190]

Second, there are meaningful differences in the factors influencing whether to prosecute a crime that do not necessarily apply to the immigration context. Some of the variables that exist with respect to a criminal prosecutor's decision to prosecute include: the existence of exculpatory evidence, the possession of physical evidence, the number of witnesses, the availability of corroborative evidence, the relationship between the victim and the defendant, the use of a weapon at the scene of the crime, and whether the case involved victim provocation.[191] One set of research reveals a significant link between the initial decision to prosecute and the desire to avoid uncertainty.[192] Reviewing the basis of uncertainty in the criminal context is beyond the scope of this article. Nonetheless, such sources of research are by no means free from subjectivity and

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[189] U.S. CONST. amend VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

[190] INA § 292, 8 U.S.C. § 1362 (2006). *See also* Resolution, American Bar Association House of Delegates, ABA Policies on Issues Affecting Immigrants and Refugees (2006), *available at* http://www.abanet.org/intlaw/policy/humanrights/immigration2.06107A.pdf (citing to I.N.A. § 292). Related studies and analyses include: Andrew I. Shoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55 (2008); Jaya Ramji-Nogales, Andrew Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007); Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 746 n.53 (2002); Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT (Migration Policy Institute), Apr. 2005, *available at* http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf.

[191] *See generally* Albonetti, *supra* note 127. *See also* U.S. ATTORNEY'S MANUAL § 9-27.230 (1997).

[192] As specified by one scholar: "Sources of uncertainty are directly related to organizationally and professionally defined measures of success. More specifically, the findings indicate that the exercise of prosecutorial discretion at the initial stage of felony screening is significantly influenced by the uncertainty of the assessment of the prosecutorial merit of a case, which is the probability of conviction. Uncertainty is significantly reduced with the introduction of certain legally relevant evidence. …Achieving a good ratio of convictions to acquittals is a well known criterion for upward movement in the legal profession." Albonetti, *supra* note 127, at 311.

socially defined factors. Political considerations also influence prosecutorial decisionmaking. As described by one scholar, "[p]rosecutorial success, which is defined in terms of achieving a favorable ratio of convictions to acquittals, is crucial to a prosecutor's prestige, upward mobility within the office and entrance into the political arena."[193]

Not surprisingly, the above-described variables do not apply neatly to the civil immigration context. For example, most immigration-related arrests do not involve a "victim" (the same can be said for some criminal offenses such as possession). Another key difference might rest on priority—for example, if the government's priority is to arrest and prosecute noncitizens working with fictitious social security numbers, or those from a particular nationality or religion, some of the variables outlined above are irrelevant. Moreover, the burden of proof on the government in a civil immigration proceeding is lower than the criminal burden of proof standard.[194] By extension, it could be argued that the pieces of evidence required to prove guilt in the criminal context are greater.

Some research also points to "extralegal" factors, such as race and gender, which influence prosecutorial decisionmaking.[195] On the other hand, a synopsis of research from Lauren O'Neill Shermer and Brian D. Johnson suggests that the empirical data is mixed.[196] For example, they point to a study of 400 burglary and robbery cases in Jacksonville, Florida by Celesta Abonetti finding no evidence of race or gender influencing the prosecutor's decision to reduce initial charges.[197] Shermer and Johnson also identify studies in which minority offenders were treated more favorably than their non-minority counterparts in charging decisions.[198] Relying on data from the Federal Justice Statistics Program, Shermer and Johnson's own research analyzed potential social inequalities related to prosecutorial decisions in the federal courts and found that extralegal characteristics such as age, race and gender had little influence on charge reduction decisions.[199] Importantly, the Shermer and Johnson analysis is

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[193] Shermer & Johnson, *supra* note 127, at 11.

[194] *See, e.g.,* INA § 240(c), 8 U.S.C. § 1230(c) (2006).

[195] *See, e.g.*, Shermer & Johnson, *supra* note 127, at 1; DAVIS, ARBITRARY JUSTICE, *supra* note 127, at 6–7; LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (2000), *available at* http://www.civilrights.org/publications/justice-on-trial.

[196] For an excellent synopsis of prior research on prosecutorial decisionmaking, see Shermer & Johnson, *supra* note 127, at 5.

[197] Shermer & Johnson, *supra* note 127, at 6.

[198] *Id.* at 6–7.

[199] *Id.* at 14 ("The FJSP collects and collates data from multiple federal agencies, including the AOUSC and USSC. The FJSP creates a unique identification number that that allows federal offenders

limited to charge reduction decisions, and therefore does not address potential disparities during other critical stages of prosecutorial decisionmaking.[200] To the extent that prosecutorial discretion in the immigration context operates with similar cost and justice-related theories as the criminal one but with far fewer safeguards, oversight and accountability of prosecutorial decisionmaking in immigration matters is vital.

Despite the important lessons to be drawn from the criminal context, there are four potential drawbacks of using the criminal system to analyze how the immigration agency should implement prosecutorial discretion. First, unlike criminal defendants, noncitizens are subject to civil immigration laws and by extension do not have the guarantee of court appointed counsel if they are unable to afford one, and do not benefit from a division of power between the arresting officer, prosecutor and grand jury. Second, due to the absence of a legal standard, or in some cases the latitude of certain rules, noncitizens are vulnerable to prolonged detention without timely charges, service of charges, or scheduling of a hearing before a judge. Moreover, noncitizens confined by DHS are typically incarcerated in correctional facilities used to hold the criminal population, raising significant questions about the appropriateness and conditions of such confinement. Third, even if the government were to consider applying the safeguards and processes in the criminal system to the civil immigration one, the costs associated with such an application, among them a grand jury process and a trial by jury, would pose serious resource constraints to the government given the large number of noncitizens who interact with immigration law enforcement each fiscal year.[201] Fourth, and related to the foregoing analysis about the factors influencing prosecution, are the diminished incentives by DHS to forgo prosecution and avoid

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to be tracked across the stages of the federal justice system."). According to Shermer and Johnson, of particular interest in the present study is the possibility of offender disparities associated with prosecutorial charge reductions. If prosecutors systemically rely on offender characteristics like age, race, and gender when deciding charge reductions, then unwarranted differences in justice are likely to characterize the federal punishment process. The present results offer relatively little support for this overarching contention. With regard to offender age, there was no evidence that younger offenders were less likely to receive charge reductions, at least not in any way that lowered the statutory maxima. Similarly, the race and ethnicity of the offender exerted no direct influences on federal charge reductions – black and Hispanic offenders were no less likely to have their charges reduced than whites. *Id.* at 27–28. But note "[a]lthough systemic charging disparities do not appear to characterize the entire federal justice system, then, important differences do emerge for certain offenders convicted of certain offenses. This may suggest that prosecutorial reliance on stereotypical patterned responses is particularly likely when both offender and offense categorizations feed into common attributions of dangerousness and culpability." *Id.* at 28. *See also id.* at 31.

[200] *Id.* at 1.

[201] *See, e.g.*, DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2008, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf; *see generally* Legomsky, *supra* note 173.

removal. Immigration scholar and professor Nancy Morawetz highlights the differences between criminal and immigration cases:

> I think there is a false analogy with the criminal cases. In criminal cases the criminal prosecutor has to think about the strength of the evidence, the difficulty of proceeding with the case, and the prosecutorial priorities of the office. In contrast in immigration, it tends to be little work to have the case proceed in court. As a result, there are no institutional disincentives to having the immigration court dispose of the case. As a practical matter, once someone is in [removal] proceedings, it is easier for the ICE trial attorney to prove removal than it is to write a memo to get superiors to agree to exercise discretion.[202]

Even more striking than the practical similarities and differences between prosecutorial discretion in immigration affairs and criminal matters, is the relationship between the argument of this article, namely that the enormous impact of immigration enforcement actions on the noncitizens and their families requires prosecutorial discretion to be administered with strong guidelines and safeguards, and the premise of the criminal prosecutor's manual, namely that the enormous impact of prosecution on the accused and his family call for a sound policy on prosecutorial discretion. While scholars and lawyers can debate the meaningful differences between the consequences of civil deportation on the one hand and criminal punishment on the other, the shared normative question about how these consequences affect the individual and his family is exceptional.

IV. LESSONS FROM ADMINISTRATIVE LAW

A. Prosecutorial Discretion and Judicial Review

A discussion about rulemaking in administrative law serves as an important foundation for the recommendation that rulemaking should be utilized to clarify the criteria and process for deferred action. Enacted in 1946, the Administrative Procedures Act is the leading statute governing the administrative process. Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein and Adrian Vermeule identify four kinds of agency decisionmaking: 1) formal on the record adjudication, 2) formal on the record rulemaking, 3) informal notice and comment rulemaking, 4)

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[202] Telephone Interview with Nancy Morawetz, Immigration Scholar and Professor, New York University (July 15, 2009).

informal adjudication.[203] The APA contains multiple sections related to the rulemaking process.[204]

Under the APA, notice of proposed rulemaking by the agency must be published in the Federal Register or personally served on affected individuals not less than 30 days before the effective date of the rule.[205] In addition, section 553 of the APA requires that individuals be given an opportunity to comment on a proposed rule, after which the agency is required to consider relevant factors and include a statement of purpose in the newly minted rule.[206] While the procedures outlined in 553(c) of the APA are identified by administrative law scholars as "informal rulemaking," the process itself is by no means informal and in fact may be more appropriately classified as "substantive rulemaking." Importantly, the APA contains the following exceptions to the substantive rulemaking requirements: 1) interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or 2) when the agency makes a good cause showing that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.[207] Kenneth Culp Davis declared the notice and comment rulemaking procedures of the APA "one of the greatest inventions of modern government," and advocated for greater rulemaking in order to increase public participation in and judicial review of agency decisions and policy.[208]

B. Agency Rulemaking and Judicial Review

As a general matter, the APA provides for comprehensive judicial review over agency actions.[209] There are two notable exceptions that apply when "statutes preclude judicial review or agency action is committed to agency discretion by law."[210] As elucidated in the next section, the

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[203] ADRIAN VERMUELE, RICHARD B. STEWART & CASS R. SUNSTEIN, ADMINISTRATIVE LAW AND REGULATORY POLICY 489 (Stephen G. Breyer ed., 6th ed. 2006).

[204] *See, e.g.*, 5 U.S.C. §§ 551, 553, 555 (2009); 7 U.S.C. §§ 701-02, 704, 706 (2009).

[205] 5 U.S.C. § 553 (2009).

[206] *Id.*

[207] *Id.*

[208] Richard Thomas, *Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Alfatoxin Dance*, 44 ADMIN. L. REV. 131, 137–38 (1992) (citing to KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969)). *See also* Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 317 (2005) (citing to KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §6.15 (Supp. 1970). Kenneth Culp Davis was a seminal scholar whose Administrative Law Treatise became a leading authority in administrative law. According to his former pupil and administrative law scholar Ronald M. Levin, "With Davis's capacity for broad research, incisive analysis, and moral passion on full display, the treatise immediately overshadowed all prior work in the area."

[209] 5 U.S.C. §§ 702, 704, 706 (2006).

[210] 5 U.S.C. § 701(a) (2006).

Supreme Court has also recognized the statutory provision eliminating judicial review over deferred action and general acts of prosecutorial discretion.[211] The relationship between informal rulemaking and judicial review has been analyzed by the courts under two paradigms. According to Richard Thomas, the first paradigm, known as the "old 'new administrative law' paradigm," is consistent with the rule-making proposition by Wildes.[212]

The second paradigm, identified by Thomas as the "newer" administrative law paradigm, is more tolerant of agency discretion and limited judicial review.[213] This newer model is reflected in the seminal decision *Heckler v. Chaney*.[214] In that case, the Petitioner was the Food and Drug Administration (FDA) and the Respondents were inmates who had been sentenced to death by lethal injection of drugs.[215] The Respondents argued that the use of such drugs violated another statute called the Federal Food, Drug, and Cosmetic Act (FDCA) and therefore requested that the FDA take "enforcement actions" in order to prevent these violations.[216] The FDA "refused their request."[217] The question for the Court was whether the FDA's refusal to take the enforcement actions was precluded from judicial review under the Administrative Procedure Act. The Court answered this question in the affirmative, concluding that the FDA's decision not to take the enforcement actions was "presumptively unreviewable."[218]

On the other hand, the older "rule-based" model was reflected in the D.C. Circuit case *Community Institute v. Young* (*CNI II*).[219] The District Circuit Court of Appeals (DC Circuit Court) analyzed whether the FDA policy controlling aflatoxin levels in corn operated as a rule subject to the normal notice and comment procedures.[220] The FDA argued that the formal notice and comments requirements under section 553 of the APA did not apply because of the exception contained in that same section for

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[211] INA § 242(g) (2006); Reno v. AADC, 525 U.S. 471 (1999).

[212] Thomas, *supra* note 208, at 132.

[213] *Id.* at 133.

[214] Heckler v. Chaney, 470 U.S. 821 (1985).

[215] *Heckler v. Chaney*, 470 U.S. 821 (1985).

[216] *Heckler,* 470 U.S. at 823.

[217] *Id.* at 823.

[218] *Heckler*, 470 U.S. at 832–33. *See also* Administrative Procedure Act [APA], 5 U.S.C. § 701(a)(2) (2006).

[219] Thomas, *supra* note 208, at 132; Community Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1987).

[220] *CNI II,* 818 F.2d 943, 943 n.1. "Aflatoxins are by-products of certain common molds that grow on various crops, including corn."

"interpretative rules or policy statements."[221] In the FDA's view, the contamination levels published in the Federal Register constituted general statements of policy. On the other hand, CNI argued that the FDA action levels operated as a rule and therefore was subject to notice and comment rulemaking. Agreeing with CNI, the Circuit Court held the following:

> We conclude that in the circumstances of this case, FDA by virtue of its own course of conduct has chosen to limit its discretion and promulgated action levels which it gives a present, binding effect. Having accorded such substantive significance to action levels, FDA is compelled by the APA to utilize notice-and-comment procedures in promulgating them.[222]

Critics of the *CNI II* decision argue that by imposing notice and comment requirements on FDA, the court created a disincentive for agencies to self-regulate. Thomas explains how such an imposition can create a disincentive:

> By subjecting agencies not only to the threat of judicial review but also to notice and comment requirements whenever an agency's own prosecutorial policy begins to take on a self-binding character, the court actually encourages agencies to rely on less binding, and potentially more arbitrary and hidden, case-by-case discretion, which involves none of the burdens of APA rulemaking and judicial review.[223]

Thomas also argues that even the greatest advocates of a "rule based" model would agree that a strong internal rule administered by the agency may be more effective in preventing discretionary abuse and misconduct than external checks.[224] He sees the articulation of *Chaney* and *CNI II* as a reflection of the unfinished debate between the two administrative law models: one that favors unchecked agency discretion, and the other which supports rulemaking subject to external checks by the judiciary and public.[225] While Thomas' call for Congress and the courts to support sound agency self-regulation is a potentially beneficial one, it is far from

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[221] *CNI II*, 818 F.2d at 949.

[222] *Id.* at 949.

[223] Thomas, *supra* note 208, at 152.

[224] *Id*. at 152 n.126.

[225] *Id*.

clear that this alone will achieve the fairness and regularity possible through notice and comment rulemaking.

C. Application of Notice and Comment Rulemaking to Deferred Action

Early opinions by the courts have analyzed whether the Operations Instruction on deferred action operates as a substantive rule subject to notice and comment rulemaking under the APA. In most cases, the courts have held that the Operations Instruction does not create a substantive right, but instead operates as an internal guideline or general statement of policy.[226] One exception is the Ninth Circuit case *Nicholas v. INS* in which the court found that the 1978 Operations Instruction operated like a substantive benefit:

> It is obvious that this procedure exists out of consideration for the convenience of the petitioner, and not that of the INS. In this aspect, it far more closely resembles a substantive provision for relief than an internal procedural guideline.… Delay in deportation is expressly the remedy provided by the Instruction. It is the precise advantage to be gained by seeking non-priority status. Clearly, the Instruction, in this way, confers a substantive benefit upon the alien, rather than setting up an administrative convenience.[227]

As recounted earlier, the INS modified the Operations Instruction in 1981 to clarify that deferred action was a discretionary act as opposed to a formal benefit. The impact of treating the Operations Instruction as a general statement of policy allowed the INS to amend and to remove the once "mandatory" nature of the Operations Instruction without public notice or comment. Likewise, it permitted the courts to uphold decisions by the agency to deferred action status to particular individuals regardless of their equities. Finally, the court traffic over the question of whether the Operations Instruction was a substantive rule inspired the explicit language contained in current agency memoranda that prosecutorial acts are discretionary, immune from judicial review and under no terms an

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[226] *See, e.g.,* Pasquini v. Morris, 700 F.2d 658, 661 (11th Cir. 1983); Soon Bok Yoon v. INS, 538 F.2d 1211, 1213 (5th Cir. 1976); Lennon v. INS, 527 F.2d 187 (2d Cir. 1975); Wan Chung Wen v. Ferro, 543 F. Supp. 1016 (W.D.N.Y. 1982); Zacharakis v. Howerton, 517 F.Supp. 1026, 1027–28 (D. Fla. 1981). *See*, Velasco-Gutierrez v. Crossland, 732 F.2d 792, 798 (10th Cir. 1984). *See also* Siverts v. Craig, 602 F. Supp. 50, 53 (D.Haw. 1985) (construing 1981 instruction).

[227] Nicholas v. INS, 590 F.2d 802, 807 (9th Cir. 1979).

"entitlement" to the noncitizen.[228]

Based on his scholarship on deferred action, administrative law jurisprudence, data from more than 1800 approved deferred action cases, and the *Nicholas* holding, Leon Wildes argues that the Operations Instruction should be recognized as a substantive rule under the APA:

> In accordance with a well-established principle of administrative law, a written expression of "policy" may be a rule and have the impact of a rule, regardless of how the agency attempts to designate or describe it. The Operations Instructions thus appears to be a firm rule. As such, it should probably be subject to the notice and publication requirements of the Administrative Procedure Act.[229]

With a spirit similar to Kenneth Davis, Leon Wildes highlights the need for subjecting deferred action to notice and comment rulemaking:

> The Service should rightfully be constrained by all the safeguards of the Administrative Procedure Act with respect to its policies, whether they be published or promulgated through the Operations Instructions, regulations, or other means. With the weight of the entire government against the alien, he should be entitled to rely upon the fact that the government will at least be bound by its own directives.[230]

Following the Wildes proposal, courts continued to interpret the deferred action program as a general statement of policy exempt from the

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[228] *See, e.g.,* Memorandum from Doris, *supra* note 3, at 3; Memorandum from Julie L. Myers, *supra* note 95.

[229] Wildes, *Operations Instructions*, *supra* note 6, at 106. One notable case summarized by Wildes, perhaps notable because of the author's residence in Pennsylvania, is a district court case *Parco v. Morris* in which the former INS Director conceded that petitioner was denied extended voluntary departure solely because of the rescission of an Operations Instruction. The court held that INS was, in practical terms, abiding by an inflexible rule issued by the Immigration Service. The Parco court went on to argue that the Operations Instruction had a "substantial impact" on the petitioner and therefore was subject to the standards identified in the Administrative Procedures Act. *Id.* at 113. *See also id.* at 107 ("[t]he particular label placed on it by the Commission is not necessarily conclusive for it is the substance of what the Commission has purported to do and has done which is decisive.") (citing Columbia Broad. Sys. Inc. v. United States, 316 U.S. 407 (1942)).

[230] Wildes, *Operations Instructions*, *supra* note 6, at 118–19 (citing to 44 Fed. Reg. 26,187 (May 4, 1979)).

APA's notice and comment requirements.[231] Nevertheless, select agency acts of prosecutorial discretion, such as deferred action, which utilize prescribed criteria to enable individuals to avoid removal and in some cases be gainfully employed, should be subject to APA rulemaking and meaningful judicial review.

D. Proposed Rulemaking on Administrative Discretion

In an effort to create clearer guidelines for INS officers and employees, INS issued a notice of proposed rulemaking intended to at least specify the relevant factors to be considered in applying several kinds of discretionary benefits.[232] Published in 1979, the proposed rules included amendments to Chapter 1 of Title 8 of the Code of Federal Regulations.[233] Several provisions of these proposed regulations would have required a favorable exercise of discretion in the absence of adverse factors. For example, with regard to the exercise of discretion under the former 212(c) waiver,[234] the rule identified the following factors for consideration in the exercise of discretion: "alien is likely to continue type of activity which gave rise to the grounds of excludability; alien has a history of criminal, immoral, narcotic, or subversive activity; act giving rise to grounds of excludability was relatively recent; no unusual hardship would accrue to alien or family members if the waiver is denied."[235]

The rulemaking effort was abandoned in January 1981. The INS concluded that "[l]isting some factors, even with the caveat that such list is not all inclusive, poses a danger that use of guidelines may become so rigid as to amount to an abuse of discretion."[236] The agency insisted that it was "impossible to list or foresee all of the adverse or favorable factors which may be present in a given set of circumstances," and cancelled the proposal "[t]o avoid the possibility of hampering the free exercise of discretionary authority."[237] The INS also argued that the rules would "eliminate discretionary powers by converting discretionary powers into a body of

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[231] *See, e.g.,* Wildes, *Operations Instructions*, *supra* note 6. *See also* Mada-Luna v. Fitzpatrick, 813 F.2d 1006 (9th Cir. 1987).

[232] Factors To Be Considered in the Exercise of Administrative Discretion, 44 Fed. Reg. 36187 (June 21, 1979); Steven O. Ludd, *Administrative Discretion and the Immigration and Naturalization Service: To Review or Not to Review?*, 8 T. MARSHALL L. REV. 65, 78 (1982).

[233] 44 Fed. Reg. 36187 (June 21, 1979); Ludd, *supra* note 232, at 78.

[234] 44 Fed. Reg. 36187 at 36189 (June 21, 1979). The 212(c) waiver was a discretionary waiver available to certain Lawful Permanent Residents "is returning to a lawful, unrelinquished domicile of seven consecutive years." 8 U.S.C. 1182(c) (1976). The discretionary component included a balancing test of adverse and favorable factors outlined in case law. *Id.*

[235] 44 Fed. Reg. 36187 at 36189 (June 21, 1979).

[236] 46 Fed. Reg. 9119 (Jan. 28, 1981).

[237] *Id*.

law."[238] The tension described by the INS between taking steps to limit arbitrary discretion on one hand, and the difficulty of multiple relevant factors on the other is an important one. Nevertheless, some scholars and practitioners have questioned the INS's decision to abandon the rule and the notable absence of empirical data to show that rulemaking on administrative discretion led to administrative paralysis.[239] Moreover, to the extent that the proposed rules would have created a new "body of law" such a creation may not be entirely without merit.[240] Administrative law scholar Steven Ludd claims that the denial and granting of petition for relief from the INS should receive greater protection:

> Following the [INS's] own logic, aren't the substantive issues surrounding the application of administrative discretion "benefits" in the truest sense of the word? Certainly the denial and granting of petition for relief from the INS through its discretionary mechanisms should receive at least as much due process protection as those accorded a petitioner within the quasi-adjudicative hearing process of the agency where other types of "benefits" accrue.[241]

Similarly, the INS-created correlation between the creation of a rule and minimizing abuse of discretion claims is tenuous as it is equally possible that the absence of such a rule would expand random decisionmaking.[242] Although a broader theoretical discussion about whether consistency leads to greater justice is beyond the scope of this article, it is necessary to note that uniformity and equity were the very concerns identified by the INS when proposing the rules in 1979.[243]

While the proposed rule analyzed above pertains primarily to formal applications for particular immigration benefits or relief from deportation, it remains relevant to prosecutorial discretion for at least two reasons. First, the content of the rule listed criteria and factors for exercising discretion that are similar in nature to the factors used in exercising prosecutorial discretion. Second, the history and intentions of the INS to create a rule through the notice and comment process and later to rescind it without explanation both highlight the relevance of administrative law and

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[238] *Id.*

[239] *See, e.g.,* Ludd, *supra* note 232, at 80–81.

[240] *See, e.g.*, *id*. at 82; Wildes, *Deferred Action*, *supra* note 8, at 824.

[241] Ludd, *supra* note 232, at 82.

[242] *See, e.g*., *id.* at 81.

[243] 44 Fed. Reg. 36,187 (June 21, 1979).

strengthen the argument for subjecting select actions of prosecutorial discretion to notice and comment rulemaking.

DHS's failure to recognize deferred action as a rule has left noncitizen grantees vulnerable to removal at a future date while alienating a countless number of qualified noncitizens from having knowledge about deferred action. The APA provides a sound structure and process for implementing deferred action as a rule. In light of the personal consequences of capricious immigration enforcement and the indefinite status deferred action provides to individuals who present humanitarian equities, promulgating a rule on deferred action is essential.

V. LIMITATIONS OF PROSECUTORIAL DISCRETION

A. Prosecutorial Discretion and Judicial Review

The limitations of prosecutorial discretion have been spelled out by the federal agency and by the courts.[244] Perhaps the greatest limitation is the agency's virtual immunity from judicial review.[245] The Supreme Court's reluctance to permit judicial review over prosecutorial discretion dates back to the nineteenth century with the Confiscation Cases.[246] Administrative Law scholar Richard Pierce rationalizes the Court's historical refusal to recognize judicial review over a prosecutor's decision:

> The list of reasons is long and formidable. It begins with the Court's awareness that no prosecutor has access to all of the investigative and prosecutorial resources required to prosecute all violations of law within his jurisdiction. That problem has increased over the years as legislative bodies have added tens of thousands of new statutory commands and prohibitions. Every prosecutor must engage in selective investigation of prosecution.[247]

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[244] *See, e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999); In Re Bahta, 22 I. & N. Dec. 1381, 1391–92 (Bd. of Immigr. Appeals 2000); Memorandum from Doris Meissner, *supra* note 3. But some courts have identified the validity of the agency's exercise of prosecutorial discretion. *See Bahta*, 22 I. & N. Dec. at 1392 ("The Service may choose to further examine this issue on remand. However, there should be no question within the Service that prosecutorial discretion, and its important concomitant responsibilities, continues to exist.").

[245] *See, e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985); Reno v. AAADC, 525 U.S. 471; *Bahta*, 22 I. & N. Dec. 1381.

[246] RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 1252 (4th ed. 2002) (citing to the *Confiscation Cases*, 74 U.S. 454 (1868)).

[247] *Id*. at 1253.

The Court recognized an exception to the general presumption against reviewability in *Yick Wo v. Hopkins*, based on a claim that the agency's selective enforcement of an ordinance against two hundred Chinese (and zero non-Chinese) was racially motivated.[248] Beginning in the 1960's the Supreme Court began to uphold court review over prosecutorial discretion as a general principle. The Court attributed this transition to the Administrative Procedures Act.[249]

More recently, the Supreme Court has reasoned that an agency's discretionary decisions are generally "presumptively unreviewable" because of the multiple and largely unknown factors considered by the agency in rendering a decision.[250] The Court in *Chaney* reasoned, in explaining why review of an agency's decision not to enforce a particular area of law is "unsuitable," that the agency is better equipped than the courts to deal with such a situation:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarity within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved.[251]

Hotel & Restaurant Employee Union v. Smith is an important immigration-related case on the standard of judicial review of the former INS's prosecutorial discretion to grant Extended Voluntary Departure.[252] In a legal challenge over the Attorney General's decision *not* to extend EVD to Salvadorans, the D.C. Court of Appeals held that his decision constituted "extra-statutory" discretion and was therefore immune from judicial review. The court held, "Where Congress has not seen fit to limit the agency's discretion to suspend enforcement of a statute as to particular

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[248] *Id.* at 1254.

[249] *Id.* at 1258 (citing to Abbot Laboratories v. Gardner, 387 U.S. 136 (1967)).

[250] *Heckler v. Chaney*, 470 U.S. at 833.

[251] *Id*. at 831–32.

[252] Hotel and Restaurant Employees Union Local v. Smith, 846 F.2d 1499 (D.C. Cir. 1988).

groups of aliens, we cannot review facially legitimate exercises of that discretion."[253]

Reno v. AADC is another defining Supreme Court case on the limits of judicial review over discretionary decisions by the immigration agency.[254] The respondents in *Reno* argued that the immigration laws were selectively enforced against them in violation of the First and Fifth Amendments of the Constitution based on their membership in Popular Front for the Liberation of Palestine.[255] The *Reno* Court analyzed section 242(g) of the INA. INA 242(g) states the following:

> Exclusive Jurisdiction—Except as provided in this section and notwithstanding any other provision of law …no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.[256]

Rather than adopt the respondents' and petitioner's view that the provision covers "all or nearly all deportation claims," the *Reno* Court instead held that 242(g) of the Immigration and Nationality Act extends to three discrete actions—whether to "commence proceedings, adjudicate cases, or execute removal orders." The Court identified these three acts as discretionary in nature, and went on to cite to one of the leading immigration treatise's formulation of deferred action:

> To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action treatment. . . Approval of deferred action status means that, for the humanitarian reasons described below, no action will thereafter be taken to proceed against an apparently deportable alien, even on

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[253] Hotel Restaurant Employees Union Local v. Attorney General, 804 F.2d 1256, 1271–72 (D.C. Cir. 1987).

[254] 525 U.S. 471.

[255] *Id.* at 473.

[256] INA § 242(g), 8 U.S.C. 1252(g) (2006).

grounded normally regarded as aggravated.[257]

In the view of the *Reno* Court, section 242(g) was "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion."[258] As to the constitutional challenge, the *Reno* Court concluded that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."[259]

In furtherance of their holding that selective discretion by the former INS to commence proceedings was not subject to judicial review, the *Reno* Court discussed the role of prosecutorial discretion in the criminal context, and cited the "substantial" concerns such as costs to the courts and the chilling effect on examining the basis of a criminal prosecution.[260] The *Reno* Court suggested that the government stakes are much higher in the immigration context because unlike the criminal context where the delay in criminal prosecution may simply delay the punishment, in the immigration context "the consequence is to permit and prolong the continuing violation of the United States law."[261] The *Reno* Court also highlighted potential foreign policy and intelligence-based rationales behind prosecutorial decisions in the immigration context and the related damage of such disclosure:

> The Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat – or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.[262]

The *Reno* Court's reasoning is consistent with the Government's position that selective prosecutions based on nationality may be permissible in the immigration context.[263] The *Reno* Court concluded that while the consequence of deportation is a grave one, it is not

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[257] *Reno*, 525 U.S. at 484 (citing to C. GORDON, S. MAILMAN, & S. YALE–LOEHR, IMMIGRATION LAW AND PROCEDURE §72.03[2][h] (6th ed. 1998)).

[258] *Id*. at n.9.

[259] *Id.* at 488.

[260] *Id.* at 490.

[261] *Id.*

[262] *Id*. at 491.

[263] *See* Transcript of Oral Argument, Reno v. AADC, 525 U.S. 471 (No. 97-1252).

punishment.[264] The Court left a small door open for judicial review:

> To resolve the present controversy, we need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome. Whether or not there be such exceptions, the general rule certainly applies here. When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity.[265]

As the sole dissenter in *Reno*, Justice Souter disagreed with the court that selective prosecution and special rules are permitted in the immigration context. In Souter's view, whether an immigration violation is "ongoing" or whether deportation is "punishment" has no bearing on the interest of avoiding selective prosecution.[266] Souter further concludes that the majority's analysis on selective prosecution in the immigration context is dictum and irrelevant to the question before the Court.[267] Notwithstanding Souter's belief that the *Reno* court's discussion on selective enforcement was dicta, the practical impact of *Reno* is significant. Gerald Neuman summarizes the implications of the *Reno* decision:

> The general lesson of AADC is that so long as an alien is deportable, she is not entitled to know why she was chosen for deportation, and (with a possible exception for especially 'outrageous' reasons, which do not include mere First Amendment objections) the reason is irrelevant to enforcement of removal. Rephrased in the plural, there are large pools of potentially removable aliens, such as illegal entrants and overstays, aliens allowed in through a retractable grant of 'parole' status and even lawful temporary and permanent residents may be or become removable for technical reasons; all of these are subject to selective enforcement. Immigration officials may choose deportees among these pools on (at least many) bases that would otherwise be constitutionally suspect, and they may

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[264] *Reno*, 525 U.S. at 491 (citing to Carlson v. Landon, 342 U.S. 524, 537 (1952)).

[265] 525 U.S. at 491–492

[266] 525 U.S. at 511.

[267] 525 U.S. at 510.

> choose based on standards of conduct that are never revealed and cannot be challenged.[268]

Responding to Neuman's commentary and as an alternative to judicial review, David Martin suggests that the agency's own watchdogs such as the Justice Department's Office of Internal Audit and the Office of the Inspector General are effective venues for oversight and review of potential misconduct or discretionary abuse by INS officers.[269] He also suggests that the independent authority of the Office of the Inspector General and the potential negative exposure that an abusive officer faces on Capitol Hill and in the media provide real mechanisms for self-control of such misconduct.[270] While administrative ombudsmen and Congress should take a more robust oversight role, such a role cannot substitute for judicial review. Leaving aside the commentary and reflections on *Reno v. AADC*, a plethora of subsequent decisions by the federal district and appellate courts have cited the decision itself, largely to support a conclusion that selective enforcement is constitutional and that prosecutorial discretion is nearly barred from court review.[271] Notably, the Meissner memo also cites the *Reno* decision.[272] Meanwhile, immigration scholar and author Daniel Kanstroom questions the impact of immunizing prosecutorial discretion from judicial review:

> The general disinclination of courts to second-guess such decisions follows patterns established by the criminal justice system. But in the deportation realm, this deferential posture is exacerbated by the plenary power doctrine— if noncitizens have no substantive right to challenge deportation laws on equal protection grounds, then how can they challenge enforcement decisions based on national origin or race?[273]

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[268] Gerald Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 630–631 (2006).

[269] David A. Martin, *On Counterintuitive Consequences and Choosing the Right Control Group: A Defense of* Reno v. AADC, 14 GEO. IMMIGR. L.J. 363, 375 (2000). The majority of immigration functions now rest with the DHS, but Martin's commentary on the potential role of the DHS of Justice's oversight entities is applicable to them.

[270] *Id.* at 376.

[271] *See, e.g.*, Kandamar v. Gonzales, 464 F.3d 65, 74 (1st Cir. 2006) ("To be sure, Moroccan nationals were required to register with DHS while a person in the same situation but not from one of the NSEERS countries would not have been placed in removal proceedings. However, a claim of selective enforcement based on national origin is virtually precluded by *Reno v. American-Arab Anti-Discrimination Committee*"); see also Rajah v. Mukasey, 544 F.3d 427 (2d Cir. 2008).

[272] Memorandum from Doris Meissner, *supra* note 3, at 3.

[273] DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 232 (2007).

B. Additional Concerns with the Current Prosecutorial Discretion Model

While the evolution of prosecutorial discretion in the immigration context has been largely commendable, concerns exist on at least two levels. First, to the extent that the Meissner memo is arguably the most authoritative on prosecutorial discretion, enforcement decisions exercised at a macro level by the agency seem inconsistent with the principles outlined in the memo. For example, in the aftermath of September 11, 2001, former Attorney General Ashcroft rolled out a program titled the "National Security Entry and Exit Registration Program (NSEERS)" largely resulting in the "registration" of thousands of visitors from Muslim-majority countries.[274] The domestic component of the NSEERS program subjected more than 80,000 men living in the United States to interrogations by immigration officers and fingerprinting and the taking of photographs to document identity. According to the government's own statistics, nearly 14,000 registrants were charged with immigration violations and nearly 3,000 were detained under this domestic scheme.[275] The NSEERS program contained several ironies, including the agency's discretionary decision to arrest nearly 14,000 young men who voluntary complied with NSEERS.[276] The impact of these arrests on domestic and foreign policy is striking, as is the arguable chilling effect it may have in encouraging others from coming forward to register in the future. A review of subsequent court cases reveals that many men arrested through NSEERS entered the United States on a valid visa, had meaningful family and economic ties to the United States, and had little to no history or indication of future criminal activity, all of which are cited in the Meissner memo as favorable factors.[277] In fact, many of the men who were arrested under NSEERS were the very kinds of individuals the Meissner memo suggests should not be targeted for prosecution in the first place.[278] It is difficult to align the Meissner memo with the immigration arrests under NSEERS.

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[274] *See generally* U.S. ICE, Changes to National Security Entry/Exit Registration System (NSEERS) (Dec. 1, 2003), http://www.ice.gov/pi/news/newsreleases/articles/nseersqa120103.htm; AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE & PENN ST. U., CTR. FOR IMMIGRANTS' RIGHTS, NSEERS: THE CONSEQUENCES OF AMERICA'S EFFORTS TO SECURE ITS BORDERS 9 (2009), *available at* http://www.adc.org/PDF/nseerspaper.pdf.

[275] U.S. ICE, *supra* note 274; AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, *supra* note 274, at 9.

[276] U.S. ICE, *supra* note 274.

[277] U.S. ICE, *supra* note 274; AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, *supra* note 274, at 33 *et seq*.

[278] U.S. ICE, *supra* note 274; AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, *supra* note 274, at 33 *et seq*.

Similarly, DHS's overwhelming focus on undocumented individuals in households and the workplace replaced any meaningful reliance on the factors discussed in the Meissner memo. According to its website, ICE has deployed about 100 teams nationwide to pursue "fugitive" aliens, defined by ICE as "an alien who has failed to leave the United States based upon a final order of removal, deportation, or exclusion; or who has failed to report to ICE after receiving notice to do so."[279] As a practical matter, a meaningful number of these "fugitive aliens" may be unaware of the fact that they received a final order of removal, or may reside in the United States with knowledge of such removal order but otherwise be contributing to an American family, the local economy or their church in significant ways.[280] ICE documented the fugitive operations teams' record of more than 34,000 related arrests during fiscal year 2008, more than double those reported in 2006.[281] In addition to "Fugitive Operations Teams," ICE has devoted a significant number of resources to worksite enforcement.[282] According to the ICE Annual Report for 2008 "In FY08, ICE worksite enforcement actions resulted in 1,103 criminal arrests and 5,184 administrative arrests—taken together, a twenty-seven percent increase over the previous year's total arrests in worksite enforcement actions."[283] Together, the surge in residential and workplace enforcement actions has been breathtaking and inconsistent with the agency's historical focus on serious offenders and genuine threats to national security. The priority shift is both troubling and inconsistent with the Meissner memo's own cautionary note about utilizing resources wisely:

> Careful design of enforcement operations is a key element in the INS's exercise of prosecutorial discretion. Managers should consider not simply whether a particular effort is legally supportable, but whether it best advances the INS's goals, compared with other possible uses of those resources. As a general matter, investigations that are specifically focused to identify aliens who represent a high priority for removal should be favored over

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[279] *See generally* U.S. ICE, ICE Fugitive Operations Program, http://www.ice.gov/pi/news/ factsheets/NFOP_FS.htm.

[280] *See, e.g.*, Wadhia, *supra* note 97.

[281] U.S. ICE, ICE Fugitive Operations Program, *supra* note 279.

[282] Notably and in contrast to the prior Administration, DHS Secretary Napolitano issued guidance highlighting that ICE will focus worksite enforcement resources on the criminal prosecution of employers. U.S. ICE, Worksite Enforcement Overview, http://www.ice.gov/pi/news/factsheets /worksite.htm. .

[283] *See, e.g.*, U.S. ICE, FISCAL YEAR 2008 ANNUAL REPORT, *available at* http://www.ice.gov/pi/ reports/annual_report/.

> investigations which, by their nature, will identify a broader variety of removable aliens.[284]

Notwithstanding the foregoing concerns with the current formulation and application of prosecutorial discretion, there exists one remaining challenge. To the extent that an act of prosecutorial discretion indefinitely delays removal and in some cases provides work authorization for groups of individuals who meet the same or similar criteria, it is difficult to conclude that such an act does not constitute a right or benefit for which any individual who appears to possess similar criteria should be eligible to seek or in the case when such a benefit is arbitrarily denied by the agency, challenge in a court of law. This challenge is not overcome simply by virtue of a "no benefit" construction clause contained in the Meissner memo.

The aforementioned analysis elucidates the various limits on prosecutorial discretion with particular focus on the availability of judicial review. While the author appreciates the various arguments against such review, the immigration context presents unique and compelling reasons for strengthening judicial review over prosecutorial discretion decisions. In situations where such discretion is ignored by individual immigration officers or by the agency at a macro level, the impact on individuals and their families can include prolonged incarceration or execution of a removal order, among other actions. Even more troubling is the Court's extreme definition of the threshold required to prove that enforcement was discriminatory or selective based on race, color, religion, sex, or national origin. Immigration officers should be held accountable when their actions or inactions significantly impact the lives of noncitizens and their families.

VI. RECOMMENDATIONS

A. Improving Standard on Prosecutorial Discretion; Codifying Deferred Action

The Department of Homeland Security should review the array of existing memoranda on prosecutorial discretion and, as practicable, consolidate them into a single memorandum. Unless and until broader structural changes are made to DHS, the new memorandum should clarify that every officer in DHS, including CBP, ICE and USCIS has the authority to exercise prosecutorial discretion. The new memorandum should reaffirm the Meissner memo with an updated narrative

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[284] Memorandum from Doris Meissner, *supra* note 3, at 6. To its credit, ICE developed guidance for officers conducting worksite raids, but this alone fails to answer the broader question of why ICE focused on nonviolent workers in the first place.

contextualizing the impact of immigration policies following the September 11, 2001 attacks, the emphasis on worksite and residential enforcement over the last eight years, the continued effects of the 1996 immigration laws, and the need for broader legislative reforms. The memorandum should adopt many of the principles outlined in the Meissner memo and also update the list of factors to be considered in the exercise of discretion. This list should identify both macro and micro situations during which favorable discretion should be exercised, among them: 1) during and after a man-made or national disaster; 2) third parties identified in the course of a worksite or residential raid; 3) individuals potentially eligible for an existing or future immigration benefit; 4) individuals impacted by the National Security Entry and Exit Registration program who are otherwise eligible for a legal immigration benefit; 5) individuals who claim to be a United States citizen; 6) "special populations" including but not limited to children, the elderly, mentally or physically disabled, pregnant women and nursing mothers, sole or primary breadwinners, and asylum seekers or those seeking fear-based protection; and 7) others who present compelling humanitarian equities. Moreover, DHS should disseminate the new memorandum to all relevant personnel. Finally, the memorandum should be published on DHS letterhead and posted on DHS's website.

In addition, DHS should promulgate a regulation on deferred action for notice and comment under section 553 of the Administrative Procedures Act. The regulation should identify the substantive criteria and procedures for applying for deferred action. The regulation should clarify that beneficiaries of deferred action are eligible for work authorization and travel under "advance parole." Similarly, DHS should consider providing such benefits for individuals who indefinitely reside in the United States as a consequence of an officer's favorable exercise of prosecutorial discretion. Finally, the regulation should enable applicants for deferred action to include an immediate family member as a derivative applicant.

B. Strengthening Procedures for Prosecutorial Discretion

1. Identify Cases for Prosecutorial Discretion Early

In keeping with the former Operations Instructions, Meissner memo, and basic economic arguments, the DHS should identify potential cases that may be suitable for prosecutorial review as early as possible in the process.[285] For example, DHS should refrain from automatically issuing a Notice to Appear when an individual has humanitarian and public interest-

[285] Wildes, *Nonpriority Goes Public*, *supra* note 7, at 50 (citing to a letter dated July 16, 1973 by then INS Assistant Commission Loughran). *See also* Memorandum from Doris Meissner, *supra* note 3, at 4.

related equities, available relief available before an immigration officer, or when the individual is willing to accept an offer of voluntary departure from ICE.[286]

2. Provide Notice and Training to DHS Personnel on Prosecutorial Discretion

DHS should provide adequate training on prosecutorial discretion. The training should include a forum for exchanging best practices and creating mechanisms for accountability. DHS should ensure that relevant personnel are provided with updates on statutory changes in the law and related guidance in a timely manner.[287]

3. Require DHS Officers to Document Decisions

In keeping with the Meissner memo, DHS personnel should be required to document decisions to enforce or to refrain from enforcement in the noncitizen's file.[288]

4. Notice to Noncitizen and Attorney After a Decision is Made

Individuals who receive a favorable exercise of prosecutorial discretion should be notified in writing. The correspondence should also identify the existence and process for any related benefits, such as work authorization. Moreover, it should include an explanation about the limitations of prosecutorial discretion. Finally, a similar letter should be sent to the individual's attorney when applicable.

5. Sustain Favorable Grants of Prosecutorial Discretion by Another Office

DHS personnel should honor cases in which another office has made a favorable exercise of discretion absent a material change in circumstances in the individual's case. DHS must bear the burden of proving such material change.

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[286] A similar recommendation appears in an Immigration Blueprint submitted to the Obama-Biden Transition Team in November 2008. This blueprint sets forth recommendations in numerous immigration policy areas and reflects input from a diverse group of organizations and individuals. *See generally* OBAMA-BIDEN TRANSITION PROJECT, IMMIGRATION POLICY: TRANSITION BLUEPRINT (Nov. 16, 2008), available at http://www.aila.org/content/fileviewer.aspx?docid=27611&linkid=188816.

[287] *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 5..

[288] Memorandum from Doris Meissner, *supra* note 3, at 11–12.

C. Increasing Oversight and Accountability

1. Create a Professional Code of Conduct for DHS Officers

Similar to what Angela Davis has recommended for the criminal system, a separate code of conduct for immigration officers should be considered.[289] This code should be created by an agent outside of ICE, CBP, and USCIS. For example, the code could be created by DHS's Office of Policy or even by an outside entity such as the American Bar Association or possibly the EOIR. The content for this professional code should include not only a description of the different stages during which an officer may exercise prosecutorial discretion but also a set of guidelines that are consistent with the newly proposed memorandum identified above. Similarly, the code should create a process whereby public and government employees may file complaints against officers who are alleged to have engaged in prosecutorial misconduct as well as language about the potential repercussions an officer may face for knowingly violating the code.

2. Improve Oversight of Prosecutorial Discretion

In addition to the potential oversight that emanates from a new professional code of conduct, DHS should enhance the internal oversight of prosecutorial discretion. For example, DHS's Officer of the Inspector General, Office of Policy, or Ombudsman could issue an annual report on the number of cases that were considered for prosecutorial discretion. In addition, the Government Accountability Office, Vera Institute for Justice, or American Bar Association could compile similar data.[290] Data compiled by DHS or a third party should be reported to Congress and made available to the public.

D. Legislative Reforms Beyond Prosecutorial Discretion

Prosecutorial discretion is a powerful tool that should be driven by sound principles and be consistent with broader immigration reforms. Prosecutorial discretion itself is a limited function that by its nature is

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[289] DAVIS, ARBITRARY JUSTICE, *supra* note 127, at 183.

[290] Over the last decade, the oversight of former INS and DHS's exercise of prosecutorial discretion has been limited. In response to a request by Congresswoman Zoe Lofgren, the Government Accountability Office issued a report in October 2007 titled "Immigration Enforcement: ICE Could Improve Controls to Help Guide Alien Removal Decision Making." U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 5. Three questions: 1. When and how do ICE officers and attorneys exercise discretion during the alien apprehension and removal process? 2. What internal controls has ICE designed to guide officer decision making to enhance its assurance that the exercise of discretion supports operational objectives? 3. What internal controls has ICE designed to oversee and monitor officer decision making during the alien apprehension and removal process to enhance ICE's assurance that the exercise of discretion supports its operational objectives?

aimed at decision-making on a case-by-case basis, in light of broader policy decisions about where to focus resources. By contrast, there are nearly 12 million individuals residing in the United States in violation of the immigration laws.[291] This estimate captures noncitizens who entered without inspection, and those who entered the United States on a valid visa but did not continue to meet the terms of their visa or allowed their visa to expire.[292] Notably, this estimate does not necessarily cover certain permanent residents (green card holders) vulnerable to removal for reasons largely related to legal indiscretions. Given the sheer size of the unauthorized immigrant population, prosecutorial discretion is not the most effective tool for recognizing their presence in the United States in the long run. To the extent that broad exercises of prosecutorial discretion have historically enabled large numbers of the unauthorized population to reside in "limbo" inside the United States, the affected individuals remain vulnerable to removal in the future and without permission to travel and in many cases work inside the United States. Moreover, when DHS's exercise of prosecutorial discretion results in the non-enforcement of the immigration laws against millions of unauthorized immigrants, public criticism is sharpened. As expressed by Cox and Rodriguez, "It is hard for the public to grasp what the executive is doing when it appears to be tolerating unauthorized immigration and engaging in seemingly haphazard enforcement of the immigration laws."[293]

Legalizing the undocumented noncitizens working and residing in the United States by creating legal avenues is more effectively reached through legislative reforms and is a subject of much debate by members of Congress, the Administration, the mainstream and ethnic media, labor unions, civil rights groups, economists, and faith-based groups, among others.[294] While the topic of legalization is beyond the scope of this article, the fine line between DHS's broad exercise of prosecutorial discretion and Congress's enactment of a workable legalization program is striking.

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[291] "According to Pew Hispanic Center estimates, there were 11.9 million unauthorized immigrants living in the United States in March 2008. . . . Unauthorized immigrants make up 30 percent of the nation's foreign-born population. . . Approximately 44 percent of the nation's unauthorized immigrants have arrived since 2000." *See* AARON TERRAZAS & JEANNE BATALOVA, MIGRATION POLICY INSTITUTE, THE MOST UP-TO-DATE AND FREQUENTLY REQUESTED STATISTICS ON IMMIGRANTS IN THE UNITED STATES *12, (2008), *available at* http://www.migrationinformation.org/USFocus/display.cfm?ID=714#8.

[292] JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW, at iv (2008), *available at* http://pewhispanic.org/files/reports/94.pdf.

[293] Cox & Rodriguez, *supra* note 68, at 66.

[294] For related articles and analyses on this topic, see Shoba Sivaprasad Wadhia, *Immigration: Mind Over Matter*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 201 (2005); NATIONAL IMMIGRATION FORUM, COMPREHENSIVE REFORM OF OUR IMMIGRATION LAWS, BACKGROUNDER (2008), *available at* http://www.immigrationforum.org/images/uploads/CIRBackgrounder.pdf.

Congress must also reform the restrictions placed on noncitizens and immigration adjudicators as a consequence of the 1996 immigration laws. Indeed, the officers who crafted the agency's guidance on prosecutorial discretion have conceded that prosecutorial discretion is insufficient to redress congressional restrictions emanating from the 1996 immigration laws. Congress should strongly consider the following reforms, by no means a comprehensive list, for adoption: 1) restore the "212(c)" discretionary waiver for certain lawful permanent residents; 2) modify the existing statutory waivers of relief from removal to an achievable standard; 3) repeal or modify sections of the Immigration and Nationality Act that define terminology and/or penalize particular conduct too harshly, among them "unlawful presence," "admission," and "aggravated felony;" 4) modify the statutory restrictions that categorically mandate detention without bond and effectively prevent immigration judges from adjudicating individual requests for release or release on bond; 5) replenish restrictions placed on federal court review, including the blanket restriction on acts of prosecutorial discretion.

Even with legislative reforms, prosecutorial discretion will remain an important tool for DHS personnel. Reforming prosecutorial discretion in a manner that resolves compelling situations in favor of noncitizens and their families is an important principle that is consistent with the Supreme Court's conclusion more than sixty years ago that deportation is a drastic measure and at times the equivalent of banishment of exile.[295] Moreover, by enacting reforms that recognize deferred action as a binding rule, permitting unauthorized immigrants to participate in a legal system, and replenishing basic protections and fairness into the removal process, DHS will be better positioned to administer the immigration laws with fairness and efficiency.

[295] Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).